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REPORTS OF CASES

39

IN THE

SUPREME COURT

OF

NEBRASKA.

JULY TERM, 1886.

VOLUME XX.

BY

GUY A. BROWN,

OFFICIAL REPORTER.

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In behalf of the people of Nebraska.

Rec. Sept. 19, 1887

THE SUPREME COURT

OF

NEBRASKA.

1887.

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SAMUEL MAXWELL,

JUDGES,
M. B. REESE.
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DISTRICT COURTS
OF
NEBRASKA.

JUDGES.

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| JAMES NEVILLE, | THIRD DISTRICT. |
| E. WAKELEY, | THIRD DISTRICT. |
| A. M. POST, | FOURTH DISTRICT. |
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| T. L. NORVAL, | SIXTH DISTRICT. |
| J. C. CRAWFORD, | SEVENTH DISTRICT. |
| WILLIAM GASLIN, JR., | EIGHTH DISTRICT. |
| F. B. TIFFANY, | NINTH DISTRICT. |
| F. G. HAMER, | TENTH DISTRICT. |

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| S. M. NEVIUS, . . . | EIGHTH DISTRICT. |
| C. C. VALENTINE, . . . | NINTH DISTRICT. |
| F. M. HALLOWELL, . . . | TENTH DISTRICT. |

REPORTER'S NOTES.

The volume of laws quoted as the "Revised Statutes," refers to the edition prepared in 1866 by E. Estabrook.

The volume of laws quoted as the "General Statutes," refers to the edition prepared in 1873 by Guy A. Brown.

The volume of laws quoted as the "Compiled Statutes," refers alike to the first edition, 1881, and second edition, 1885, compiled by Guy A. Brown.

Acts of various years are cited by reference to volume of laws and the year in which they were passed.

This volume contains a report of decisions handed down prior to January Term, 1887, except those previously reported, and some cases in which rehearings have been granted.

The syllabus in each case in this volume was prepared by the judge writing the opinion, in accordance with rule 23.

Lincoln, March 1, 1887.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JULY TERM, 1886.

PRESENT:

HON. SAMUEL MAXWELL, CHIEF JUSTICE.

" M. B. REESE, }
 " AMASA COBB, } JUDGES.

**FREEMAN C. DODGE ET AL., PLAINTIFFS IN ERROR, V.
V. S. RUNELS, DEFENDANT IN ERROR.**

1. **Bill of Exceptions: TIME OF PREPARATION.** In a jury trial a motion was filed to set the verdict aside, and the cause continued by the court to the succeeding term, when the attorneys for the prevailing party entered a remittitur for \$449.99 damages; whereupon the motion for a new trial was overruled. The losing party thereupon prepared a bill of exceptions, which, after being duly presented to the attorneys for the adverse party, was signed by the judge. *Held*, That the party had the statutory time in which to prepare a bill of exceptions after the filing of the remittitur.
2. **Verdict.** Where the testimony is conflicting and nearly equally balanced, the verdict will not be set aside as being against the weight of evidence.
3. **Replevin: DAMAGES.** Where property is taken from a party under an order of replevin, and the jury afterwards finds in his favor, the measure of damages, in case a return cannot be had, where there is no assessable value, is the value of the property at the time it is taken, with interest thereon.

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ERROR to the district court for Hall county. Tried below before NORVAL, J.

Thummel & Platt and *T. O. C. Harrison*, for plaintiff in error.

Thompson Brothers, for defendant in error.

MAXWELL, CH. J.

This action was brought by the plaintiffs against the defendant to recover the possession of five hundred sheep and sixty-one lambs, which property was taken under the writ and delivered to the plaintiffs. On the trial of the cause the jury found the right of property and right of possession to be in the defendant, and found the value of the property to be the sum of two thousand and seventy-eight dollars, and the damages of the defendant to be the sum of four hundred and fifty dollars. The plaintiff thereupon filed a motion for a new trial, which was taken under advisement by the court, the journal entry being, "And the court not being fully advised in the premises, takes time to consider of its judgment until the next regular term of the court, to which time this cause is continued."

At the next term the attorneys for the defendant filed a remittitur of the sum of \$449.99 damages; whereupon the court overruled the motion for a new trial, and entered judgment on the verdict.

The attorneys for the plaintiffs thereupon prepared their bill of exceptions, which, after being submitted to the attorneys for the adverse party, was presented to the judge within sixty days, and by him duly signed. A motion is now made in this court to strike the bill of exceptions from the files, for various reasons, the principal one being that it was not prepared and signed until the succeeding term after the verdict was rendered.

As we understand the order of the court below in continuing the cause, the entire cause was continued until the succeeding term—not only the hearing upon the motion, but the disposition of the whole case, including the preparation of the bill of exceptions; and this seems to have been the construction placed upon the order by the judge that tried the cause, in signing and certifying the bill. It is evident that but for the remittitur the court would have set the verdict aside; and the attorneys for the plaintiffs had the right to rely upon this as sufficient cause of itself for a new trial. The defendant, therefore, by virtually confessing that sufficient error existed in the record to secure a new trial, cannot, upon removing that, deprive the parties of such other errors in the record as they may deem material in the case. The bill of exceptions, therefore, was duly prepared and signed, and the motion to quash it on that ground must be overruled.

2. The principal grounds of error relied upon are that the verdict is not sustained by sufficient evidence, and error in the measure of damages.

The testimony tends to show that in the summer of 1882 the plaintiffs entered into an arrangement with one F. E. Smith whereby Smith was to go west and purchase sheep, the plaintiffs to furnish the money and Smith to perform the labor, and the profits to be divided equally between Smith and the plaintiffs. Smith thereupon went west, and purchased 3,856 sheep, and brought them to Hall county. Smith there had the care of the sheep, and purchased feed for them, and in the fall of 1882 purchased from one Squires ten rams, in the name of Dodge & Co., plaintiffs, and placed them with the ewes in the flock. The price of these rams was \$325, and was due March 1, 1883. No effort seems to have been made by the plaintiffs to pay this debt, although it is evident that they knew of its existence, and when it was due; and in May of that year Smith sold 500 ewes and 61 lambs to Squires, for the sum of \$2,020, and

deducted the value of the rams, \$325, from that sum. Squires, in a short time thereafter, sold the sheep and lambs in question to the defendant for \$2,040. The defendant, without doubt, is a *bona fide* purchaser; and if Smith had authority to sell the sheep and lambs in question the defendant is entitled to protection. Upon this question there is a direct conflict in the testimony; but in our view a clear preponderance of it shows that Smith did have such authority. It would subserve no good purpose to review the testimony at length, but it fully sustains the verdict.

3. The testimony shows that the sheep in question were worth from \$3.50 to \$4.50 per head, and the lambs about \$1.50. Some irrelevant questions were asked on both sides which were not material, nor, so far as we can see, prejudicial. The value evidently was computed upon what the sheep and lambs were worth at the time they were taken under the order of replevin, and the court allowed interest on that sum from the date of the verdict. This in our view is correct procedure where the property had no assessable value. Where the property cannot be returned the analogy of trover is followed and the measure is its value at the time of the conversion. *Garrett v. Wood*, 3 Kas., 231. *Berthold v. Fox*, 13 Minn., 462. *Sedgwick on Damages* (6th ed.), 624. *Romberg v. Hughes*, 18 Neb., 579. There is no error in the record of which the plaintiffs can complain; the judgment must therefore be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. SAMUEL J. STEVENSON, V. RICHARD A. WHITE.

Cities of Second Class: VACANCY IN OFFICE OF POLICE JUDGE. In 1881, N. City was a city of the second class, having not less than fifteen hundred inhabitants. In that year W. was elected police judge of that city and was re-elected in 1883 and 1885, and qualified, and has continuously performed the duties of the office. In 1886, N. City was declared a city of the second class, having not less than five thousand inhabitants, and S. was elected police judge thereof, and thereupon brought an action to oust the incumbent from that position and to be installed therein; *Held*, There being no provision in the statute declaring the office of police judge vacant, that the mere change from a city of the second class of the minimum number of fifteen hundred to a city of the second class of not less than five thousand inhabitants did not vacate the office of police judge, the duties in each case being substantially the same.

QUO WARRANTO.

*Samuel J. Stevenson (Frank T. Ransom with him),
pro se.*

John C. Watson, for respondent.

MAXWELL, CH. J.

In 1881, Nebraska City was a city of the second class, having more than fifteen hundred and less than twenty-five thousand inhabitants, and in that year the defendant was elected police judge of said city for the term of two years. In 1883, and again in 1885, he was re-elected and qualified, and under his election in 1885, is now performing the duties of the office. In 1885, the legislature passed an act to amend certain sections of the "act to provide for the organization, provision, and powers of cities of the second class having more than ten thousand inhab-

itants," approved March 1st, 1883, and another act amending certain sections of the act of March, 1883. Under these amendments all cities having more than five thousand inhabitants, and less than thirty-five thousand, were, upon the proclamation of the governor to that effect, to become cities of the second class, having more than five thousand inhabitants, and to be governed by the provisions of the statute in relation to such cities. Comp. Stat., Chap. 14, Art. II.

Section eleven, as amended, provides for annual elections, and for the election of a mayor, treasurer, clerk, and police judge, each of whom shall hold his office for the term of two years.

Under this amended statute Nebraska City was declared to be a city of the second class under the act of 1881, as amended in 1883 and 1885. It must be understood that this description of cities of the second class occupies an intermediate grade between cities having not less than fifteen hundred inhabitants, and less than twenty-five thousand inhabitants, and cities of the first class, and is governed by a statute differing in some of its powers and details from cities of the second class containing not less than fifteen hundred inhabitants.

The relator was elected police judge at the annual election in April, 1886, and now seeks to oust the defendant from that office. The question for determination is, did the change of the government of Nebraska City from a city of the second class of not less than fifteen hundred inhabitants to a city of the second class of not less than five thousand inhabitants vacate the office of police judge? We find nothing in the statute in relation to the matter, nor that any of the city officers whose term had not expired should cease to exercise the duties of his office. Neither has any case been cited showing that such result would naturally follow the change of the form of government. Although the form of government of a city may

change in some of its details, the corporation itself does not change; it is still a city, with its liabilities and duties differing in some respects, but substantially the same, whether clothed with the powers of a city of the second class of the minimum number of fifteen hundred or of five thousand. The duties of police judge are substantially the same whether performed under the former city government or the present. There would seem to be no necessity therefore for declaring the office vacant in the middle of the term of the present incumbent, and in the absence of any expression of the legislative will on that subject we must hold that the term of the defendant does not expire until 1887. The writ must therefore be denied and the action dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

CITY OF LINCOLN, PLAINTIFF IN ERROR, V. JESSE B.
HOLMES, DEFENDANT IN ERROR.

1. **Municipal Corporation: DEFECTIVE SIDEWALK: TRIAL: NEWLY DISCOVERED EVIDENCE AFTER VERDICT.** Where, in an action to recover damages against a city for injuries occasioned by a defective sidewalk, a verdict was returned in favor of the plaintiff for the sum of \$3,500, which verdict on the motion of the city, supported by affidavits of parties who came forward after the verdict and stated that they were present at the time of the accident, and that the plaintiff did not fall on the sidewalk at the time stated as claimed, and therefore was not injured thereby, was set aside, *Held*, That the newly discovered evidence was not cumulative, and that the court was justified in setting the verdict aside.
2. **Instructions asked must be applicable to the testimony, and where an instruction upon a given point has once been fairly given it should not be repeated, as it gives it undue prominence.**

ERROR to the district court for Lancaster county. Tried below before MITCHELL, J.

Allen W. Field and Lamb, Ricketts & Wilson, for plaintiff in error.

Snelling & Talbot, for defendant in error.

MAXWELL, CH. J.

This action was brought by the defendant against the plaintiff to recover damages for injuries sustained by falling into a hole in a sidewalk on P street in said city in October, 1882. The questions presented as stated in the abstract of the pleadings are as follows:

"The petition claims that the defendant is a corporation, among other duties charged with the control, and keeping in good condition and repair, the streets of the city of Lincoln; that on or about October 1st, 1882, P street was a common thoroughfare of the city, and that at and long prior to that date the said P street, between 12th and 13th, opposite block 37, was out of repair, the sidewalk being broken, and there being pitfalls and irregularities, which the defendant knew and suffered, without repairing the same or there placing any light or signal to indicate the dangerous condition; that on or about the first of October, 1882, the plaintiff (defendant in error), on the evening named, lawfully traveling on the street and unaware of the danger, and without his negligence, was precipitated into the hole named, and received great bodily injury, by the which he has been kept in bed and detained from business about a year and eleven months, has spent about \$1,000 in medical attendance and nursing, and has been permanently crippled to his damage in \$10,000, for which he prays judgment and costs of suit."

The defendant answering, admits the due incorporation

of the city, but denies each and every other allegation in the petition, and says, if the plaintiff sustained injury it was by his own negligence and fault, and not by reason of the fault or negligence of the defendant.

In reply the plaintiff denies all allegations of new matter in the petition.

At the February, 1885, term of the district court of Lancaster county the case was tried and a verdict rendered in favor of Holmes for the sum of \$3,500. This verdict, for cause to be hereafter stated, was set aside, and a new trial awarded. On the second trial Holmes recovered the sum of \$950, upon which, after overruling a motion for a new trial on behalf of the city, judgment was rendered. The city now brings the cause into this court by petition in error.

The defendant also has filed a cross petition in error alleging error in setting aside the verdict for \$3,500, upon the ground of newly discovered evidence. The affidavits filed on the hearing of that motion tend to show that on the night of September 30th, 1882, Susan B. Anthony delivered a lecture at the opera house in Lincoln; that the defendant and his wife attended the lecture. To this point all the affidavits agree, but three of the affiants swear that they were following close behind the defendant and his wife on their return home, and that the defendant did not fall at the place indicated in the sidewalk, but the defendant's wife did. One of them states that "Dr. Jesse Holmes (the defendant) did not fall. Dr. Holmes assisted his wife to rise, that affiant and her sister were so close upon Dr. Holmes and his wife that she stepped upon her dress before she could stop; that affiant asked if she could assist them; that Holmes and his wife immediately preceded affiant and her sister and passed up Q street to their home."

Two other persons swear to substantially the same facts. Holmes, his wife, and son swear positively that the injury occurred as stated in the petition, thus making a direct conflict in the testimony as to whether or not the defendant

had been injured at that place. This testimony was proper to be submitted to the jury as tending to contradict that of the defendant and his wife given on the trial of the case, and was not cumulative, as no testimony had been given on that point on behalf of the city in the first trial. There was no error therefore in setting the verdict aside and granting a new trial. It is evident, from reading the affidavits, that some of the parties were in error—a case of mistaken identity, perhaps.

2. There is a very large amount of testimony in the record, and, except on the point as to the cause of the injury, there is but little conflict. That the sidewalk at the point indicated was in an unsafe and dangerous condition all the testimony tends to show. The nature of the injury and its cause as claimed by Holmes was given in his direct examination, which is as follows:

“Name, Jesse B. Holmes, 71st year, residence 1634 Q street, Lincoln, on the last of Oct., or first of Nov. 1882, was returning home from lecture of Susan B. Anthony at Opera House, was on north side P st., bet. 12th and 13th, the walk was defective from broken boards, some were absent making a place, say the width of a board. It was about 10 o'clock, and the night was disposed to be a little drizzly. Cannot say positively. I do not think there were lights on the street. Only my wife was with me. I had passed over the street before, but cannot say when. It was on my road from the city home. I could not distinguish the walk, but suppose by close inspection I could have seen a defect, but didn't notice it. I had been in the habit of going down town, but mostly in my buggy, and so was not so familiar with the walk. After the lecture my wife and I had stayed to speak to the lady, whom we had known before, and so were later than we would have been. My wife and I were by ourselves. I stepped into the place, also my wife—I across the walk, and she forward a little. I was hurt a good deal, and found an impedi-

ment in rising. After a little my son Jesse came up, and with his help and wife's I came home. I think the hole was the ordinary width of a sidewalk board, and half a leg deep. I felt the effects in my back and hips—cannot say in which first. I got better for a little while, so with help I could get in my buggy and ride down town, but at street crossings the jerk would hurt me. Pretty soon there came on a kind of inflammatory condition, which passed off, and left me more helpless than before. That was contrary to my anticipation, and I observed then I would be subject to severe pain in hips and back. I have practiced medicine about thirty years. I sent for Dr. Carter to come as a matter of professional etiquette. He visited me several times within a week or two. By his aid I got better. In talking afterwards with him he said there had been some rheumatism. Dr. Carter went to Ohio, so I called in Dr. Robbins who visited me occasionally, and calls to the present time to see how I thrive. Drs. Fuller and Chapin had had a consultation and examination of me, and prescribed. Dr. Dayton and other physicians called in, but not on an occasion of that kind. Gradually I lost use of my limbs. They were useless for a while, and now I can only draw them up a little. For a long time my general health was impaired, but I would eat as much as a person of my age, and taking the exercise I did, ought. The upper lumbar and lower dorsal vertebra were affected. Up to the injury my general health was good—I was robust for my age. At first here I did not practice, but I resumed practice, and when the injury occurred I estimate my income at \$100 a month. Aside from physicians named I have had liniment from Mr. Leighton, and Dr. Maxwell came for months daily, in 1883, and rubbed me. I guess two months or six weeks after accident I called in a physician, and up to that time I had applied plasters, liniment, and other ointments.

Q. You said this opening you fell in was about the

width of a plank, of some depth—did you observe at that time any other openings along in the vicinity of this place?

Excepted to as incompetent, immaterial, and irrelevant.

A. My impression is—I seem to have a general impression of other openings along there.

My impression is I must have passed the place going to the lecture, but I cannot say. Cannot say whose property the place was opposite; my impression is there was a fence along there. For a considerable time after the injury I was able to get in and out of my buggy with help, and get around to visit one or two patients; and immediately after the hurt I was able to go with crutches round the house a little, but when I was taken with the fever attack I was not able to move for a while. That was perhaps from a week to ten days after the injury. I have not been off my bed, except lifted off on sheets, to have it made, for about two years. Since the injury I do not suppose I have been able to get around on crutches even for a month."

The court on its own motion gave the following instructions, to each of which the plaintiff herein excepted:

1. The plaintiff alleges in his petition that on or about the first day of October, 1882, while walking along and upon the said walk of the defendant on "P" street, between 12th and 13th streets in the city of Lincoln, and while exercising ordinary care for his personal safety he fell and received injury to his person and suffered damages; that said injury was received and the damages so suffered were on account of and by reason of the defective, unsafe, and dangerous condition of the sidewalk complained of.

The defendant by its answer puts all these allegations in issue, and the plaintiff must prove them all by a preponderance of the testimony before he will be entitled to a verdict at your hands. If he does so prove them you should allow him reasonable and just compensation for the damage so sustained by him, resulting from the injury so received.

2. Under its charter and under the law it is and was the duty of the city of Lincoln to keep and maintain the sidewalk complained of and at the point in question in a reasonably safe condition for travel by the ordinary and usual modes, and if the plaintiff while passing over in the usual mode, using ordinary care for his personal safety, received personal injury and suffered damage on account of defendant's neglect of that duty, you should find for the plaintiff.

3. Ordinary and reasonable care required of plaintiff is that degree of care which might reasonably be expected from an ordinarily prudent person under the circumstances surrounding him at the time.

If you should find from the evidence that at the time and prior thereto plaintiff knew of the defective and dangerous sidewalk, and where it was located, he was required to use more care than if he had not such knowledge, and if he neglected to do so and such neglect contributed to the injury, he cannot recover; but if he did use more than he would be required to do in case he had no such knowledge and was injured by reason of defendant's neglect, and no fault of plaintiff contributed to the injury, you should find for the plaintiff.

4. If you find from the evidence that the sidewalk in question was in a defective or unsafe condition at or before the time of the occurrence and the city authorities had knowledge or were notified of that fact, it was their duty to repair it without unnecessary delay, and if they failed or neglected to do so, and the injury, if any, resulted on that account, was the consequence of such neglect and no fault of plaintiff contributed to the injury, you should find for plaintiff.

5. Actual knowledge in all cases need not be proven, but may be inferred if the defective and unsafe condition of the sidewalk is open and notorious and continued for a length of time in which and within which the city authorities in

the exercise of reasonable diligence and care, in their reasonable supervision over the streets, the city would be liable just as in cases of actual notice.

6. If you find from the evidence and these instructions that the plaintiff is entitled to recover, it will be your duty to fix and ascertain from the evidence the amount to which he is entitled; you should carefully examine all of the evidence as to the nature, character, and extent of the injury, and the result, whether the disability, if any, resulted from the injury was permanent or temporary; its extent, whether total or partial; if any permanent disability resulted you should consider plaintiff's age, his reasonable expectancy of life, how much money he could earn as he was before the injury, how much, if any, he could earn with his reduced capacity, if any there was on account of the injury, remembering that no reduction of capacity on any other account is to be considered, and allow him a reasonable compensation for any loss of time and capacity resulting from the injury. You should also allow him for his suffering. The law lays down no rule for estimating of his damages on this account, but leaves it to your sound judgment, and you should allow him such amount as in your best judgment would be just and right under the circumstances, not exceeding in all the amount claimed—\$10,000.00.

7. You are the sole judges of the credibility of the witnesses and the weight of the testimony. In the consideration of these questions you have a right to consider the interest of the witnesses, their manner and conduct upon the stand, their means of knowledge about the things about which they undertake to testify, the probability or improbability of their being mistaken, the circumstances with which the parties were surrounded, whether it was a dark night, and the opportunities for correct and reliable observation, and all other circumstances that can in any way assist you in coming to a just conclusion, and give

such credit to the witnesses and such weight to the testimony as you may think they ought to have.

No particular objection is pointed out in these instructions, and in our view, they state the law correctly. On behalf of the city, fourteen instructions were asked, and all of them refused, and this refusal is now assigned for error.

We think the court did not err in refusing to give the instructions asked; a number of them are not predicated upon the testimony, and others a mere repetition of those already given by the court, and the whole well calculated to divert the attention of the jury from the main issues in the case, viz: the defective sidewalk and the injury, if any, to Holmes, the defendant.

In *Parrish v. State*, 14 Neb., 60, it was held that instructions should be, as far as practicable, in view of the evidence, couched in plain, simple language; and where they are, and conform to the principles and policy of the law, it is enough; and in *Fitzgerald v. Morrissey*, 14 Neb., 198, it was held that the very large number of instructions asked by the defendant was properly refused, as such portions of them as had not previously been given by the court, on its own motion, were not applicable to the testimony. The same rule applies in this case.

The questions of fact were properly submitted to the jury, and they having weighed the testimony, and found in favor of the defendant in error, we see no reason for disturbing the verdict. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

NOAH R. PRATT, PLAINTIFF IN ERROR, V. HATTIE E. SMITH, DEFENDANT IN ERROR.

Petition upon an undertaking for appeal examined and held sufficient.

ERROR to the district court for Adams county. Tried below before MORRIS, J.

R. A. Batty, for plaintiff in error.

Capps & McCrary, for defendant in error.

REESE, J.

The original action in this case was upon an appeal bond, or undertaking, executed by plaintiff in error and another, for the purpose of enabling one Lizzie Hustern to appeal to the district court of Adams county from a judgment rendered against her by a justice of the peace of said county, in favor of defendant in error.

The petition filed in the district court alleged all the substantial and essential facts, apparently, and set out therein a copy of the bond, together with a copy of the final judgment rendered against said appellant, and of the officer's return upon an execution thereon, by which he certifies that he is unable to find any property of the judgment debtor upon which to levy to satisfy the same.

To this petition plaintiff in error filed a demurrer, which was overruled, and to which he excepted, but refused to plead further. From the judgment, subsequently rendered against him, he removed the cause to this court by proceedings in error.

The cause was filed in this court November 11th, 1885, but no abstract or brief having been filed by plaintiff in error, the defendant in error submitted the cause under

Mushrush v. Devereaux.

the provisions of rule three of the court, without brief or abstract.

As the only question presented by the demurrer filed in the district court was as to the sufficiency of the petition, we have no other question before us. This petition, as it seems to us, contains all the averments usually required in such cases, and in the absence of any defects being pointed out by plaintiff in error, it will be held good.

The judgment of the district court will therefore be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JACOB MUSHRUSH, PLAINTIFF IN ERROR, V. CLEVELAND
DEVEREAUX, DEFENDANT IN ERROR.

Jurisdiction of County Judge and Justices of Peace.

Under the provisions of the constitution and the statute enacted pursuant thereto, county judges and justices of the peace have jurisdiction of actions, within the stated limits as to amount, for money had and received, brought to recover back a deposit, or money paid upon an agreement for the purchase and sale of land, where the defendant omits or refuses to perform his agreement to convey the same.

ERROR to the district court for Hall county. Tried below before NORVAL, J.

Thummel & Platt, for plaintiff in error.

H. B. Wilson, for defendant in error.

COBB, J.

This action was brought before the county judge of Hall county to recover back the sum of forty-two dollars, paid

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| 20 | 49 |
| 45 | 611 |
| 30 | 49 |
| 49 | 217 |
| 20 | 49 |
| 57 | 157 |

on a verbal contract for the purchase and sale of a certain parcel of real property.

The brief of defendant in error contains a statement to the effect that the above named sum, which was paid on the purchase, bears such relation to the entire sum or price which was to have been finally paid for the farm, as to bring the case within the authority of *Poland v. O'Connor*, 1 Neb., 50. I must assume this to be true, as forty-two dollars is, certainly, but a small portion of the value of an average farm in this state, and nowhere in the record or brief of either counsel are we informed what the price agreed upon was, or really that any price was agreed upon.

In the second clause of the syllabus of the case above cited, the court say: "Payment of a small portion of the purchase price is not such part performance as takes the contract out of the statute of frauds." The contract, then, was void, and could be neither plead or proved in any court. However, I do not consider it important whether the contract between the plaintiff and defendant for the purchase and sale of the farm was a legal and binding contract or not. The plaintiff's right to recover depends solely upon the payment of the money by him and the refusal by the defendant to convey the land.

Plaintiff in error in his brief contends, "that inasmuch as the pleadings show upon their face that this was an action to recover money on a contract for the sale of real estate, the county judge had no jurisdiction of the subject matter," and he cites sections 16 and 18 of article VI. (the judiciary article) of the constitution.

Sec. 16 relates to county courts, and after providing for their jurisdiction generally, and that they shall not have jurisdiction in criminal cases in which the punishment may exceed six months' imprisonment, or a fine of over five hundred dollars, it proceeds, "nor in actions in which title to real estate is sought to be recovered or may be drawn in question, nor in actions on mortgages or contracts for the conveyance of real estate," etc.

Sec. 18 relates to the jurisdiction of justices of the peace and police magistrates, and after limiting their jurisdiction in certain respects, by the use of negative words, continues, "nor in any matter wherein the title or boundaries of land may be in dispute."

This was not an action in which the title to real estate was sought to be recovered, nor was it one in which such title was or could have been drawn in question. Neither was it brought on a mortgage nor a contract for the conveyance of real estate. I may add, also, that it was not a matter wherein the title or boundary of land was or might be in dispute.

It was an action for money had and received, hence the petition need not state the terms of the contract for the sale of the land, but only the payment of the money by the plaintiff to the defendant on the contract, which the defendant refused to perform. This, I think, is all that is necessary under the code. All that was required at common law in such a case, as stated by Chitty, was, "that the defendant is indebted to the plaintiff in a certain sum for money had and received by the defendant, to and for the use of the plaintiff." 1 Chit. Plead. 11 Am. Ed., 363.

"This action," says Chitty, "is frequently brought to recover back a deposit or money paid upon an agreement which the defendant omits or refuses to perform. As a general rule, it lies to recover a deposit paid on the purchase of an estate, if the title be defective, or the vendor be not prepared to show his title on the day fixed for that purpose between the parties by their agreement," etc. *Ibid.* 367. See note n, and authorities there cited.

The plaintiff's cause of action, therefore, depending not upon the defendant's want of title, but upon his refusal or failure to comply with the terms of his contract, upon which the advance payment was made, the county judge was not ousted of jurisdiction to try the action by reason

 Dettrich v. Hutchinson.

of the constitutional provisions cited, or the provisions of the statute enacted in pursuance thereof.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

CHARLES H. DETTRICH, PLAINTIFF IN ERROR, V. GEORGE
D. HUTCHINSON, DEFENDANT IN ERROR.

1. **Assignment for Creditors: PREFERRING CREDITORS.** A debtor, even when in failing circumstances, has the right to pay the *bona fide* demand of one of his creditors to the exclusion of others. *Linsinger v. Raymond*, 12 Neb., 19. A partnership or firm has the same right so long as the payments are made in good faith to creditors of the partnership.
2. **Trial: QUESTIONS FOR JURY.** Where a cause is being tried to a jury all questions of fact at issue, and material to the case, should be submitted to them with proper instructions for their guidance.

ERROR to the district court for Adams county. Tried below before MORRIS, J.

J. M. Woolworth and *R. A. Batty*, for plaintiff in error.

Thurston & Hall and *Dilworth & Smith*, for defendant in error.

REESE, J.

This was an action of replevin brought against the sheriff (Hutchinson), for the possession of a stock of goods levied upon by him, and which was claimed by plaintiff in error, who was plaintiff in the district court.

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| 30 | 131 |
| 20 | 52 |
| 43 | 229 |
| 90 | 52 |
| 44 | 43 |
| 20 | 52 |
| 49 | 150 |

The petition was in the usual form, and, aside from the simple allegation of ownership contained therein, the issues of fact were formed by the answer and reply. The defendant sheriff answered that the goods in question were at a former time owned by and in the possession of the firm of Benjamin & Hutchinson, doing business in Hastings. That while thus owning the goods they became indebted to certain parties named in large amounts, which were reduced to judgments, and for the satisfaction of which, upon execution, the levy upon the goods had been made. This indebtedness was something over \$1,900. That for the purpose of paying off this indebtedness the firm sold the property to Benjamin, who undertook and agreed to pay all the said debts, holding and using the goods for that purpose, this undertaking being, in part at least, the consideration for the goods, and that this undertaking on the part of Benjamin was well known to plaintiff at the time he purchased the property from Benjamin. It is further alleged, that "for the purpose of defrauding said creditors and fraudulently hindering and delaying the collection of said debts, plaintiff attempted to purchase said property from said Benjamin, well knowing the conditions on which Benjamin received and held the same, without providing for the payment of said debts, and that the firm and its members were insolvent unless said property was used to pay their debts."

The reply consists of a general denial, and the allegations, that in March, 1882, plaintiff was the owner of the property in question, and sold it to Benjamin & Hutchinson for the sum of \$3,900, for which they executed to him their promissory notes. That afterwards, in contemplation of a dissolution of said firm and a sale of the goods to Benjamin, by reason of plaintiff being the principal creditor, he was consulted as to the transfer, and it was then agreed by all the parties that in case of a dissolution of the firm and the purchase of the property by Benjamin,

and the assumption by him of the debts, he should first pay the firm's debts to plaintiff, and that plaintiff should at all times be a preferred creditor. That the sale was made to Benjamin as contemplated, and the agreement made with plaintiff according to the foregoing statement. Benjamin continued in business in his own name until plaintiff became dissatisfied as to the safety of his claim, and purchased the stock of goods of Benjamin for the sum of \$5,000, which was more than its value, applying in payment the notes referred to, and that he took possession of the goods and continued in possession until the levy thereon by defendant. Other allegations and denials are made, but which, in our view of the case, need not be noticed.

The cause was tried to a jury, who, by direction of the court, returned a verdict for defendant. Plaintiff alleges error on the part of the court in directing this verdict, thereby refusing the submission of the questions of fact to the jury.

It is not deemed essential here to examine at any great length the testimony of the various witnesses who testified on the trial of the cause. It is sufficient to say that plaintiff by himself and others sought to sustain the issue on his part as presented by his pleadings. He sought to show that the firm was indebted to him in the sum of about \$4,200, and that the remainder of the \$5,000 was applied to the payment of partnership indebtedness, and that there was no fraud in the purchase.

As said in *Roop v. Herron*, 15 Neb., 80, "A partnership is a distinct entity, having its own property debts and credits. For the purposes for which it was created it is a person, and as such is recognized by law." It is well settled in this state that a debtor may prefer one of his creditors. *Bierbower v. Polk*, 17 Neb., 268. *Nelson v. Garey*, 15 Id., 531. A partnership or firm, being in law a person with all the powers of an individual, within the scope of

Roehl v. Roehl

its business would surely have the same right. If, therefore, plaintiff was the principal creditor of the firm, and the firm saw proper to give him the preference, so long as no actual fraud was intended or perpetrated, they had the right to do so. If an individual debt of one member of the firm was included in the consideration, while plaintiff might possibly in a proper proceeding be called upon to respond to the extent of the misappropriation, yet in the absence of any fraudulent intent on plaintiff's part it would not vitiate his whole purchase.

In causes tried to a jury all questions of fact are for their decision. The trial court cannot assume any material fact in issue to exist, even though the testimony may seem to preponderate largely in its favor.

We think the questions of fact involved in this case should have been submitted to the jury, with proper instructions upon the law applicable thereto for their guidance.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

BERTHA ROEHL V. AUGUST ROEHL AND AUGUST
KOEHN.

Practice in Supreme Court. Decree modified to correspond with the special findings of fact by the trial court.

APPEAL from the district court of Pierce county. Heard below before TIFFANY, J.

H. C. Brome, for appellant August Koehn.

J. H. Gurney and A. F. Wilgoski, for appellee.

REESE, J.

This was an equitable action instituted by plaintiff (appellee) to set aside a conveyance made to appellant Koehn by plaintiff and her husband jointly.

The allegations of the pleadings may be briefly stated as follows :

It is alleged by plaintiff that on the 24th day of May, 1880, plaintiff and defendant August Roehl were married, and that they lived together as husband and wife until about the 27th day of August of the same year, when the husband became guilty of extreme cruelty toward plaintiff, and abandoned her. On that day, prior to the abandonment, he conveyed the land in dispute to defendant Koehn, without consideration, and that she joined in the execution of the deed. Her consent to the conveyance was obtained by the representation on the part of the husband that with the proceeds he would purchase other land, near the relatives of plaintiff, and they would live thereon ; but that in fact these representations were but a trick and device to procure the signature of plaintiff to the deed of conveyance, and that the only purpose and intent of defendant Roehl was to prevent plaintiff from obtaining satisfaction of any decree for alimony which she might thereafter obtain. That defendant Koehn knew at the time of the conveyance the purpose and intent of Roehl in making it. That in an action for a divorce and alimony subsequently instituted plaintiff had recovered a decree of divorce and alimony in the sum of one thousand dollars, which decree for alimony remains unsatisfied. Prayer that the deed be annulled and that the land conveyed thereby be made subject to plaintiff's decree for alimony.

The answer of Koehn denies the knowledge of any intent on the part of Roehl to defraud his wife, and alleges

that the purchase was made in good faith and for a valuable consideration.

A trial was had, which resulted in a decree in favor of plaintiff. Defendant appeals.

The findings and decree as furnished by the abstract are as follows :

"The court finds that on the 27th day of August, 1880, the said August Roehl and the plaintiff were husband and wife.

"That on said day the said Roehl, having previously determined to abandon his said wife, did, for the purpose of defrauding his said wife out of any rights she had or he might thereafter have to said land hereinafter described, sell and convey said land to the other defendant, and induced the plaintiff to join in the deed by representing to her and promising that he would use the money to buy another home near by; that he had no intention whatever of keeping said promise, but that plaintiff relied upon them, and was thereby induced to sign the deed.

"The court further finds that the evidence does not sustain the allegation that the defendant Koehn had notice of the fraud at the time of the deed to him, but the court finds that he had such notice after the payment of the first \$150, and that the deed was fraudulent as to the defendant Roehl, and that the defendant Koehn had notice of such fraud before he paid any but the first \$150. * * *

"The court further finds that on the 26th day of April, 1883, a decree of divorce was duly rendered in this court in this cause, divorcing the plaintiff from the defendant Roehl, and giving her the care and custody of the minor child of said defendant and plaintiff; a judgment and order in said cause against the said defendant Roehl, that he pay to her as alimony the sum of one thousand dollars, to be paid as follows, to-wit: \$300 on the 26th day of October, 1883, three hundred dollars on the 25th day of October, 1884, and four hundred dollars on the 25th day of October,

1885, and twenty-five dollars attorney's fees. That the said defendants appealed said cause to the supreme court of the state of Nebraska, and said judgment was in said court at the January term, 1884, duly affirmed, and that the said judgment is wholly unpaid, and that the said August Roehl has no property out of which the same can be paid.

"It is therefore ordered, adjudged, and decreed that the land in question, to-wit: The s $\frac{1}{2}$ of the s-w $\frac{1}{4}$ and n-w $\frac{1}{4}$ of the s-w $\frac{1}{4}$ of section No. 27, and the n-e $\frac{1}{4}$ of the s-e $\frac{1}{4}$ of section No. 28, all in township No. 25 north, of range 1 west of the 6th P. M., being the land hereinbefore referred to, be sold to satisfy said judgment, said sale to be subject to the lien hereinafter mentioned, and that if the said defendant shall fail to comply with the judgment and order heretofore rendered within thirty days from this date, that an order of sale issue for the sale of said property as upon execution. It is further ordered, adjudged, and decreed that the said defendant August Koehn have a first lien upon said land for the repayment to him of the first \$150 paid by him to the other defendant for said land.

"It is further ordered that the costs of this suit, made since the affirmance of this decree of divorce in the supreme court, be taxed against both of said defendants.

The testimony showed that the land in question was conveyed to defendant Roehl by his parents, who retained possession of a part of the dwelling house; and that the consideration was an agreement for their maintenance. This encumbrance was on the land at the time of the conveyance to Koehn; and as plaintiff was fully aware that the consideration which was named in the deed to Koehn, and which she supposed he was to pay, in addition to carrying out the contract made between Roehl and his parents, was five hundred dollars, to which she assented, we cannot see that she should be allowed to require Koehn to pay more than he agreed to pay, so long as he acted in good faith.

 Knowlton v. Mandeville.

The finding of the court that "the evidence does not sustain the allegation that defendant Koehn had notice of the fraud at the time of the deed to him" must be taken as equivalent to a finding that he had no such notice until after the execution of the deed and the payment of the first \$150. This being true, it would seem clear that to that extent he should be protected. It would follow that the decree was to that extent erroneous. The decree must therefore be modified to the extent that plaintiff have a lien on the real estate as against Koehn for the sum of \$350, the amount fraudulently paid to Roehl after full notice of the rights of plaintiff, but for no more.

The decision of the district court will be reversed and a decree entered in this court in accordance with the above; and that unless the said sum of \$350 is paid into court within six months from this date, an order of sale issue for the sale of the real estate described in the petition, for the satisfaction thereof.

DECREE ACCORDINGLY.

THE other judges concur.

WILLIAM A. KNOWLTON, PLAINTIFF IN ERROR, v. JOHN
MANDEVILLE, DEFENDANT IN ERROR.

Verdict: INSTRUCTIONS. Where the verdict is the only one that should have been returned by the jury under the evidence, it will not be set aside, notwithstanding the court may have given an instruction upon a matter not in issue in the case.

ERROR to the district court for Dixon county. Tried below before CRAWFORD, J.

W. E. Gantt, for plaintiff in error.

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| 20 | 59 |
| 32 | 738 |
| 20 | 59 |
| 43 | 880 |
| 20 | 59 |
| 47 | 518 |
| 20 | 59 |
| 50 | 185 |

Barnes Brothers, for defendant in error.

MAXWELL, CH. J.

This action was brought upon three promissory notes, the amount claimed in the aggregate being the sum of \$280.87.

The defendant filed an answer as follows :

He admits the making of the notes described in plaintiff's petition at the time and place alleged in said petition, and that he gave the same for and in consideration of a certain combined mowing and reaping machine, known as the Knowlton Reaper and Mower ; that the defendant bought said machine of said plaintiff through the said plaintiff's agent, Frank Peavey, and as payment for said machine this defendant gave said plaintiff his notes as stated in his petition ; that at the time of buying said machine the said plaintiff warranted and fraudulently represented said machine to do good work, and to be one of the best machines in the market.

Defendant further says that he took said machine home with him and set the same up, and tried to use it as a reaper ; that the said machine did not work, and said defendant was unable to make said machine work ; and that said defendant immediately notified said plaintiff that said machine would not work, and that plaintiff sent his agent to put said machine in order ; that said agent came to the farm of defendant and tried to work said machine, but was unable to do so ; and then and there said defendant turned said machine over to said plaintiff, and demanded said notes sued on in plaintiff's petition, and said plaintiff refused to deliver the said notes, and never did deliver the said notes to this defendant. Defendant says that machine was taken by said plaintiffs at that time, and sold by them, and that defendant never received any value for said notes whatever, and has been unable to get said notes from said plaintiff.

The reply is a general denial.

The defendant was a witness in his own behalf, and testified as follows :

I reside in Dixon county. I purchased a reaper, and passed the notes in suit in payment of it. I purchased it of Mr. Peavey ; I supposed he was acting as agent. He represented the reaper to be a good one. He said if it was not as good as a McCormick I would not have to keep it. I took it home and set it up on Tuesday. On Wednesday, in the afternoon, I tested it in my own field. I then took it into Mr. O'Neill's field, and we couldn't do anything with it. Then we took it in Mr. Kerwin's field and tried it, and we could not do any better with it. There were three different fields I tested it in in three days.

I then went to Sioux City and told Mr. Peavey I could not do anything with the machine. He asked me what was wrong and I told him as near as I could. He said : "My man that sets up machines is up in Dakota, and will be home to-night, and as this is Saturday evening, if you will wait until Monday morning he will go out with you and see what is the matter." I waited until Monday, I think, and we went out there. He sent Steve Gretzer, his man, out with me. We got there about noon, I think. After we got our dinner we hitched our team up to the machine and looked at it to see that it was set up right, and we drove around a while but we couldn't do anything with it. He said my team was too light and we got Mr. Kane to drive it with his team ; but at the time he got around he told Mr. Kane to drive it out on the prairie and leave it, as it was good for nothing. Mr. Kerwin was present.

In a few days—7 or 8 days—I went to Mr. Peavey's office and asked him for those notes. He said : "I have sent them to Mr. Knowlton." I said : "I want the notes." He said : "I will write for them and have them back for you in a few days." Mr. Knowlton was the manufacturer of the machine.

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I don't know what became of the machine afterward. I think it stands on the prairie yet. I never heard Mr. Peavey or his traveling agent say anything in regard to their selling machines to other parties. Mr. Gretzer could not make the machine work. He told Kane to drive it out on the prairie. He couldn't use it. It was worthless. In fact it was good for nothing. I did not have any conversation with Mr. Peavey about the machine being sold afterward, except what he said that same fall the second time I went to demand the notes. He said he hadn't them back again; he said that he guessed he would have to write for them again. I went to work, and a few weeks after that I went again, and he said, You can never recover those notes; he said, You will come by them some day or other. He did not admit that he had sold the machine to some one else.

CROSS-EXAMINATION.

I bought this machine at Sioux City of Mr. Peavey. I never worked for him. I have lived at Sioux City; I did not at the time I bought the machine.

I never worked at setting up machines. I got the machine at Mr. Peavey's warehouse. I brought it out home myself. I was not acquainted with the Knowlton machine then. I am now. I never saw them worked before. I bought this one because Mr. Peavey said it would do as good work as as a McCormick, and if it didn't I wouldn't have to keep it. I have seen a McCormick machine work. There were no Knowlton machines in my neighborhood. I have never known a Knowlton machine to fail before except by hearsay. I set up the machine and tried it at once. I had set up other machines in Iowa for myself and others. I never was employed in selling machines nor in working for men who sold them. When I took this machine Mr. Peavey represented it to be a machine that would do good work. He did not give me

Knowlton v. Mandeville.

a written warranty; he merely told me he thought it was a machine that would do good work. Most anybody gets that representation that buys a machine. I was acquainted with Peavey. I tried it in wheat. It was a fair average field. I went around the field. I tried it three or four times. I tried it in other fields that were fair average grain—some heavier and some lighter. I did not try it with any other machine. While I was at work in Mr. Kane's field, Mr. Kerwin drove in with a McCormick. The one machine followed the other around the field. The McCormick was the best machine. I did not see that the McCormick went better in one kind of grain than in another. After I found the machine wouldn't work, I went to Sioux City. I went to Peavey's office and told him the machine wouldn't work. He said: "Mr. Gretzer will be home to-night and will go out with you Monday." We went out Monday. I could not see that he made any material changes in the machine. He might have changed the reel or some of the bolts. I did not try the machine after that. Gretzer tried it awhile and he hauled it out on the prairie. He didn't tell me what was the matter with the machine. I didn't do anything with the machine after it was driven on the prairie. I do not know what became of it.

I never returned it to Mr. Knowlton. I was in after a few weeks, when I asked Mr. Peavey for those notes, and I told him where it laid, that it was just where Mr. Gretzer left it. He said: "What will you take to bring it in?" I told him I would bring it in for \$2.50. He said he could get a team and go out and bring it in for \$2.00, and he wouldn't pay that much.

Q. Did you then turn it over to Mr. Peavey?

A. I presume I did. It had been turned over before. I was done with it after Gretzer had told them to draw it out on the prairie.

I didn't tell Peavey so personally. I do not know

Knowlton v. Mandeville.

whether Gretzer is a machinist or not. He could set up a machine or a reaper as far as that went.

RE-DIRECT.

I relied on the representations made by Peavey in regard to the machine being a good one. If I had not I wouldn't have passed my notes. Gretzer tried the machine after he came out. We had Mr. Kerwin's team. Mr. Kerwin happened to drive in before we got through and drove right along on the same swath and took up a good deal of grain that we left. The agent had got Mr. Kane to drive the machine with a heavier team than I had. He said my team was too light. He told Mr. Kane to drive the machine out on the prairie and leave it, and I said nothing. The agent was the one that tested it then. I claimed that I had tested it in three or four fields before he got there.

Patrick Kerwin, being sworn, testified as follows:

I have resided in Spring Bank precinct since '71 or '72. I am acquainted with the parties to the suit and have seen the reaper. I think I was in Mr. Kane's field once when it was tried. I guess they were at work there before noon trying to make it work; but they could not get the machine to work. I understood it was to do as good work as the McCormick. I think Mr. Gretzer came for me and wanted me to bring over the McCormick and see if it would cut the grain. I think he had Mr. Kane drive Mandeville's team. I followed him and cut right along on the same ground and cut the swath at one side that he run over entirely. At the other side of the field it cut as clean as any. When the wind blew against it it would do good work, but if the wind wasn't blowing against it it would not work at all.

After a while Gretzer asked me if I would let him have my team. He said he thought Mandeville's team was too light. We hitched on my team and I walked along with

Knowlton v. Mandeville.

Gretzer, and Kane drove after. We went along with it a round. He came back and told him to unhitch, that he was through. He didn't tell me to take it out on the prairie, they drove it out. The McCormick did the best work, the other machine didn't do any work in fact.

CROSS-EXAMINATION.

The Knowlton machine cut one way, but not the other. The reason was the wind blew pretty strong from the north and blew the grain right on the platform. When it was going against the wind it would cut clear. When going the other way it would gather under the reel, and would not cut. It seemed that day that it took the wind to get it to cut clean. The McCormick would cut against the wind as with it. I saw the two machines work together. I am not acquainted with the Knowlton machine except that one, I never seen one used before. I think I saw one at a distance. The McCormick, Buckeye, and Woods's are generally used in my section. Gretzer was there all the time. I don't know what he did say. He said the machine wouldn't suit him. I don't know what he did do with the machine. He left the machine on the prairie. This I seen. I didn't see the machine until I was sent for. I have heard they were cutting in other fields. Previous to this time I seen it cutting in light and heavy grain. It didn't act better than the McCormick in heavy grain. If the wind blew it in the platform it did good work. I don't think it was tried on a calm day. That was all the trial I ever seen.

I understood Gretzer was working for Peavey setting up machines. I have known him for years previous. His occupation was setting up machines, and although Gretzer did not say anything about taking the machine away that I heard, he had said, "Take it out of the field, that he wouldn't ask any man to use it." He made no reply to Mandeville when he told him to take it.

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RE-DIRECT.

I am pretty sure I seen a Knowlton machine work on the Dakota bottom at a distance. I don't know how it worked. I heard everything that passed between Mandeville and Gretzer in my pasture. I didn't drive the machine; they had my team. Mandeville told Gretzer to take the machine away. Gretzer made no reply. He told me that the machine wouldn't suit him. I do not know what he done with the machine. It was drove out on the head land and left there.

Steven Kane, being sworn, testified as follows:

I am a resident of Dixon county, Nebraska. Was present at a trial of a Knowlton reaper sold to Mandeville. Mr. Mandeville got the machine I think a few days before and tried it for two or three hours, and I think the machine passed through the grain and wouldn't cut it, and I think he went to Sioux City to get some one to come out and fix the machine so it would run. I think Gretzer and Mandeville came out on Monday, and Gretzer and I went to the machine and looked it over, and he said he didn't think there was anything wrong with it. He tinkered around awhile. I don't know what he done with it. After we had done we hitched Mandeville's team on it. The team was a very light one and the machine wouldn't work. Gretzer said he thought the team was too light to keep up the speed. We sent for Mr. Kerwin and his team and the McCormick mower. That was the understanding—the machine was to do as good work as the McCormick. Mr. Kerwin came there with the machine and followed around and took up lots of grain that the Knowlton machine left. Gretzer I think appointed me to drive the team of Kerwin to the Knowlton machine at the same speed the McCormick was drove, and I done that as near as I could. The Knowlton machine did not do good work. It run over the grain considerably. When the

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wind blew the grain on the sickle bar it would cut it, but when the wind blew it away it would run over it. After we tried to test the machine it was drove out on the prairie and left. I cannot say whether it was Mandeville or Gretzer that ordered me to take the machine out there. I think Mandeville ordered me to drive the machine out on the prairie. I did not hear Gretzer express any opinion about the machine.

CROSS-EXAMINATION.

I have known Mandeville about ten years. I knew him at Sioux City. He was working at days work there. I didn't see the machine when he brought it home. I don't know how hard the wind was blowing. It was a pretty fair gale, not a very strong wind—it was quite a breeze. You know it always blows a pretty good breeze on the prairie. It was blowing quite a little gale. We did not try the McCormick at the same time. I don't know if the wind was blowing as hard as when we tried the Knowlton machine. I think it was. The McCormick cut clean. We tried them as near together as we could. I unhitched from one and hitched to the other.

The defendant rested.

The plaintiff, to sustain the issues on his part, offered and read in evidence the deposition of Steven Gretzer as follows:

I am 38 years of age. Reside in Council Bluffs, Iowa. Am a traveling salesman. Am acquainted with the parties to this suit. I met Mr. Knowlton once in Sioux City and met Mandeville at his place in Dakota county, Neb. I was sent there by Mr. Peavey, who was agent for Knowlton's New Manny reaping and mowing machines and harvesters. I have had some four years' experience in selling, handling, testing, and using reaping machines from the years 1876 to 1880, and my experience has been with several reaping machines in handling and testing said ma-

chines, and have a knowledge from using, testing and handling reaping machines. At the time of my visit to defendant I was traveling salesman or canvasser for reapers and other agricultural implements for Peavey Bros., who sold the machine to the defendant. I was sent there by Peavey Bros. to see the machine work. I examined the machine as to material, workmanship, condition, and quality and found it all right. I tested the machine in grain with a McCormick machine. Part of the grain was thick and heavy and part of it was very light. The Knowlton machine did not cut so well in the very light grain, but cut much better in the heavier grain, and on the whole did better work than the McCormick. There was no defect in the machine. Peavey Bros. have sold hundreds of these machines, and all have given satisfaction, and this one sold to defendant was as good in workmanship and material as the others. I know of no good reason why the machine would not do good work. It did good work when I tested it. I know the warranty given on the sale of these machines, and this one fully complied with it. When I left the defendant's place he stated he would not keep the machine and pay for it even if it did work. Plaintiff rested.

DEFENDANT'S REBUTTING TESTIMONY.

Patrick Kerwin:

I heard the deposition of Gretzer, and observed that portion relating to the working of the machine. I had a conversation with Gretzer in regard to the working of the machine. He told me, as near as I can remember, that it was the only one he had ever had anything to do with that he could not get to work pretty well. He also told me that this machine would not work—that it would not suit him.

Steven Kane:

I heard the deposition read. I heard the portion of it

Knowlton v. Mandeville.

relating to the working of the machine. I did not hear the conversation between him and Mr. Kerwin. I heard Mr. Kerwin ask him what he thought of the machine and he said the machine wouldn't suit him. That was all I heard.

The foregoing is all of the evidence offered or introduced by either party on the trial of the cause.

The court on its own motion gave to the jury the following instructions:

1. The defendant having admitted the execution and delivery of the notes sued on, it devolves upon him to prove his defense by a fair preponderance of all the testimony.

2. When a party sells to another a machine to do certain work, there is an implied warranty that it will do the work for which it is intended, in a good and workmanlike manner, even in the absence of an express warranty.

3. If you find that the reaper did not do good work, or failed to work as warranted, and that the reaper was taken back by the plaintiff, then the defendant was entitled to a return of his notes, and you will find for the defendant.

4. If you find from the testimony that the plaintiff warranted the reaper to do as good work as the McCormic reaper, and that it did not do as good work, and that the defendant returned the machine to the plaintiff after giving it a fair trial, then you will find for the defendant.

5. If you find from the testimony that the defendant gave the plaintiff an opportunity to put the machine in order and test it, and that after such test or trial the plaintiff, through his agent, failed to make the machine do good work, and that plaintiff ordered the defendant to deliver the machine at a certain place, and that the defendant did so deliver the machine at said place, then the plaintiff cannot recover in this action, and you will find for the defendant.

6. But if the jury find from the testimony that the machine was not warranted, or that it did do good work, or that the machine was not returned, as explained in these instructions, then you will find for the plaintiff.

7. If you find for the plaintiff you will find the amount due upon the notes with interest, and assess their damages in the amount claimed in the petition.

8. If you find for the defendant you will so say by your verdict.

To the giving of numbers 2, 3, 4, 5, and 6, plaintiff excepts.

The following instructions were given at the request of the plaintiff.

2. The jury are instructed that the fact of Gretzer being employed by F. Peavey to repair and set up the machine did not make him an agent of plaintiff to receive the machine.

Modified by the court with the addition: That if the acts of said Gretzer were affirmed and accepted by plaintiffs or their agents, or if Peavey's agency necessitated the employment of others, and he did so employ, then the plaintiff is bound by the acts of such agents within the scope of the agency.

3. The jury are instructed that the only evidence in regard to a return of the machine is, that one Gretzer, who was in the employ of Frank Peavey, went to defendant's place of residence and examined said machine, and the evidence shows that an attempt was made to turn the machine over to this party. In order to avail the party as a defense, the evidence must not only show that the machine was turned over to this man, but it must further show that he was authorized to receive the same for plaintiff, and if the proof fails to show that he was authorized to receive the same by plaintiff, then this will not be any defense, and plaintiff will be entitled to recover.

Modified by the court as follows: That if Peavey afterwards recognized such return, then plaintiff is bound by it.

4. The jury are instructed that a delivery of the machine to a workman employed by plaintiff's agent, is not a return of the same to the plaintiff.

Modified by the court as follows: Unless the plaintiff's agent who sold the machine accepted such return or recognized such return.

That portion of the above instructions that are numbered 2, 3, and 4, asked for by plaintiff, which are printed in italics, was added by the court as a modification of the same, and to the modification thereof the plaintiff duly excepted.

The following instruction was asked by the plaintiff and refused by the court, to the refusal to give which plaintiff duly excepted:

The jury are instructed that if the defendant purchased the machine without an express warranty from the plaintiff, he bought the same at his own risk, and plaintiff is not liable for defects in the machine.

The jury rendered the following verdict:

We, the jury, duly impaneled and sworn in the above cause, do find for the defendant, John Mandeville.

L. G. WRIGHT,

Foreman.

It will be observed that the testimony tends to show that Peavey was the agent of the plaintiff; that he warranted the machine in question to do as good work as the McCormick, and that if it failed to do so the defendant was not to keep it; that the machine in fact did not do as good work is clearly established. It will be observed that Mr. Gretzer, while testifying generally to the good quality of the machine, fails to deny certain things attributed to him by the witnesses, which are material in the case. Neither does Mr. Peavey deny that he offered the defendant two dollars

to return the machine, nor any of the conversation which the defendant testifies he had with him. Many of the material facts sworn to by the defendant and his witnesses therefore stand admitted. There is, therefore, not only sufficient testimony to sustain the verdict, but the jury would not have been justified in returning a different one. The second instruction given by the court on its own motion was not required by the issues in the case and should not have been given, but as it is apparent that the verdict is the only one that should have been rendered under the evidence, it will not beset aside.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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| 30 | 72 |
| 28 | 88 |
| 28 | 850 |
| 20 | 72 |
| 40 | 838 |

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| 20 | 72 |
| 60 | 841 |

W. H. DICKENSON ET AL., PLAINTIFFS IN ERROR, V.
THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Trial: EVIDENCE INSUFFICIENT TO SUSTAIN FINDING.** Where, upon the trial of a cause, facts are proved on the part of the plaintiff by parol testimony within the pleadings, sufficient to establish the plaintiff's case *prima facie*, and none of such testimony being contradicted, the defendant proves by record evidence, also within the pleadings, such facts as establish a complete defense, such evidence taken together will not sustain a finding for the plaintiff.
2. **Recognizance.** A recognizance for the appearance of an accused person to answer to an indictment for felony, taken before and approved by an officer or person unauthorized by law, or where under the facts of the case the taking thereof is unauthorized by law, so that the same fails to be binding under the statute, *Held*, Also to be void as a common law obligation.

ERROR to the district court for Saunders county. Tried below before Post, J.

S. H. Sornberger, for plaintiff in error, cited: *State v. Carothers*, 11 Iowa, 273. *Harris v. Simpson*, 14 Am. Dec., 104, note. *State v. Daily*, 14 Ohio, 91. *Farley v. Budd*, 14 Iowa, 289. *Powell v. State*, 15 Ohio, 580. *Morrow v. State*, 5 Kan., 565. Crocker on Sheriffs, secs. 127, 128. *Clark v. Cleveland*, 6 Hill, 344. *Williams v. Shelby*, 2 Oregon, 144. *Harris v. Simpson*, 4 Littell (Ky.), 165.

William Leese, Attorney General and *J. R. Gilkeson*, for the state, cited: *Enyeart v. Davis*, 17 Neb., 228. *State v. Cannon*, 34 Iowa, 325. *Park v. State*, 4 Georgia, 329. *Archer v. Hart*, 5 Florida, 237. *Adams v. Thompson*, 18 Neb., 541. *Gudtner v. Kilpatrick*, 14 Neb., 347.

COBB, J.

This action was brought by the state against the plaintiffs in error, together with one Doan Benson, on a criminal recognizance given by them conditioned for the appearance of the said Doan Benson at the October, 1882, term of the district court for Saunders county, to answer to an indictment preferred against him and his certain co-defendants, for the crime of burglary. Process being served only upon the plaintiffs in error, they made their joint answer in the case, setting up various grounds of defense. A trial was had to the court (a jury being waived) which found for the plaintiff, and thereupon, after overruling a motion for a new trial on the part of the defendants, a judgment was rendered for the plaintiff for the sum of \$555 together with costs. And thereupon the cause was brought to this court by petition in error.

There are eight errors assigned in the petition in error, but it is not deemed necessary to state them in detail here. It appears from the bill of exceptions that on the 8th day of March, 1882, upon the complaint of Anson W. Han-

cock, a warrant was issued by the county judge of Saunders county for the arrest of Doan Benson, the principal defendant in the action in the court below, together with three others, for the crime of burglary. On the same day, the said warrant having been placed in the hands of C. M. Pickett (whether sheriff, constable, or person specially appointed to serve the same, does not appear), the defendants were arrested and brought before the said county judges for examination. The said examination was at the defendants' request continued to the 14th day of the same month, and the said defendants entered into bonds with security for their appearance on the said adjourned day. On the 14th day of March, at the hour appointed, the said Doan Benson and one of his co-defendants appeared before the said county judge, waived a preliminary hearing, and entered into bond, with approved security in the sum of \$500, for their appearance before the district court of said county at the next term thereof, etc. At the next term of said district court, to-wit, on the 8th day of April, 1882, the said Doan Benson, together with his co-defendants in the proceedings above stated, having been jointly indicted by the grand jury of Saunders county for the crime of burglary, the same being the same burglary for which they had been arrested and held to bail by the said county judge as above stated, appeared in the said district court personally as well as by counsel, were arraigned, and severally pleaded not guilty to the said indictment. Thereupon one of the co-defendants of the said Doan Benson elected to take a several trial, was put upon his trial, and tried upon the said indictment before the said court and a jury. The said jury failed to agree upon a verdict in said cause, were discharged by the court, and thereupon, as appears by the record and journal entry in said cause, it was "further ordered by the court that the defendants * * Doan Benson * * * * *, and * * be held to bail in the sum of five hundred dollars each for his appearance at the first day of the next term of

this court to answer the charge against him, and in default thereof that they be committed to the custody of the sheriff. And thereupon the said defendants * * with * * * * as his surety, Doan Benson with W. H. Dickinson and H. H. Dorsey as his surety * * * with * * and * * as his surety and * * * with * * and * * as his surety, and entered into recognizance in accordance with the above order and this cause is continued." It further appears that the said Doan Benson did not appear at the next term of the district court held in and for said county to answer said indictment, but wholly made default, whereupon his default was regularly entered.

The petition, after alleging the finding of the indictment by the grand jury of Saunders county against the said Doan Benson and his co-defendants and the returning of the same into the said court, proceeds as follows: "And thereupon a capias was duly issued for the arrest of the said Doan Benson and placed in the hands of C. E. Lillibridge, the sheriff of said county of Saunders; and at the said time an order was duly made by said court that the bail of the said Doan Benson be fixed at the sum of five hundred dollars, and the said C. E. Lillibridge, sheriff as aforesaid, by virtue of said capias, thereupon duly arrested the said Doan Benson, and took him into custody and retained him, the said Doan Benson, in custody until the 13th day of April, 1882, on which day, while the said Doan Benson was yet in the custody of the said C. E. Lillibridge as aforesaid and during the vacation of said court, the said Doan Benson as principal, and the said defendants, W. H. Dickenson and H. H. Dorsey as sureties, by virtue of said order of the court duly entered into a recognizance to the state of Nebraska" etc. This petition was drawn under the provisions of §§ 430 to 433 inclusive of chap. XLI. of the criminal code, which provides as follows:

"Sec. 430. When any person shall have been indicted for a felony, and the person so indicted shall not have been

arrested or recognized to appear before the court, the court may at their discretion make an entry of the cause on their journal, and may order the amount in which the party (indicted) may be recognized for his appearance by any officer charged with the duty of arresting him.

"Sec. 431. The clerk issuing the warrant on such an indictment shall indorse thereon the sum in which the recognizance of the accused was ordered as aforesaid to be taken.

"Sec. 432. The officer charged with the warrant aforesaid shall take the recognizance of the party accused in the sum ordered as aforesaid, together with good and sufficient sureties, conditioned for the appearance of the accused at the return of the writ before the court out of which the same issued; and such officer shall return such recognizance to the said court, to be recorded and proceeded on as provided in this code."

The case made by the pleading is doubtless good under the statute above quoted; but does the evidence sustain the pleading? In reviewing the evidence so far as may be deemed necessary, it may be proper to revert to the point made in sundry modifications of form by the plaintiff in error, based upon the overruling of his objections by the court to the evidence offered by the state: 1st. The plaintiff in error complains of the overruling by the court of his objection to the admission in evidence "of that part of the deposition of S. G. Chany which appears on the face of said deposition to have been taken on the 8th day of May, 1884." By reference to the record it appears that when this deposition was offered on trial counsel objected to it on the ground that it was "irrelevant, incompetent, immaterial, and not the best evidence." But, in the brief, counsel endeavors to sustain this point of the petition in error on the ground that this deposition was introduced for the purpose of contradicting the record. At the time that this deposition was offered it was clearly inadmissible. In

connection with the testimony subsequently introduced of the service and loss of the capias which said Chany testified in the said deposition to having theretofore issued, and upon which, upon the theory of the plaintiff in the court below, the said Benson was arrested, the deposition was admissible; and had it been excluded when the objection of plaintiff in error was made it would doubtless have been afterwards re-offered and properly admitted. No error can therefore be now predicated upon its admission, even at a point of time and stage of the proceedings when, as we have above stated, it was inadmissible; and the objection that it contradicts the record cannot be sustained, for the reason that as the case was presented in the court below it comes before the record, and in its absence may have been deemed sufficient to prove so much of the plaintiff's cause of action as depended upon the arrest of the said Benson after the adjournment of court. But little need be said of the second, third, fourth, fifth, and sixth points presented in the bill of exceptions. Upon the theory of the case as presented by the state, ignoring the facts that the defendant Benson had been arrested and brought before the county judge; that he had entered into a recognizance for his appearance at the district court; that he had so appeared, and upon the return of the indictment against him had been arraigned, and had plead thereto, the matters embraced in these points were free from error.

This brings us to the consideration of the two last points, numbered respectively seven and eight, and are as follows:

"7. The court erred in overruling a motion of the plaintiff in error for a new trial.

"8. The court erred in finding for and giving judgment in favor of the defendant in error."

These two assignments may be considered together. As above stated, the petition of the plaintiff clearly states a cause of action under the provisions of the statute hereinabove quoted; and I think the evidence produced at the

trial on the part of the state was sufficient while standing alone to have warranted a finding and judgment for the plaintiff.

But the defendants produced and introduced in evidence the record of the district court of Saunders county, containing the return to said court by the county judge of said county of the proceedings before him whereby the said Doan Benson was arrested, on a warrant issued by said county judge on the 8th day of March, 1882, for the said crime of burglary; that the examination of said Doan Benson upon said charge was by the said county judge continued to the 14th day of the said month; that on said last mentioned day the said Doan Benson waived an examination before said county judge, and together with an approved security entered into a recognizance for his appearance before the district court in and for said county at the next term thereof, to-wit, on the 3d day of April, 1882; also the said defendants produced and introduced in evidence on the said trial the record of the said district court of a day of the term thereof of April, 1882, to-wit, the 8th day of April of said year, whereby it appears that on said day the motion of the said Doan Benson and his co-defendants to quash the indictment found against them for burglary was overruled. Whereupon the said defendants, including the said Doan Benson, were arraigned, and severally plead not guilty to each count of the indictment, and each declared themselves ready for trial.

While, as I have above stated, the evidence introduced on the part of the state was *prima facie* sufficient to bring the case within the provisions of the statute, it is equally true that the above cited evidence introduced on the part of the defendants takes it out. The only question which remains then is, whether the court, having before it one line of parol evidence proving the plaintiff's case, and another independent line of evidence furnished by its own records disproving many of the essential facts of the plain-

tiff's case necessary to its right to recover, could find for the plaintiff; or rather, having so found, is this court, under the law and rules governing appellate proceedings, bound by such finding?

This is not a case of conflicting evidence, but rather one of conflicting theories, one of which is proven by a chain of superior, *i.e.*, record evidence, and the other by oral testimony. These two theories are not entirely inconsistent with each other. It is possible that although Benson had been arrested on complaint of Hancock and brought before the county judge on a charge of burglary, had waived such examination and entered into a recognizance with security for his appearance at the next term of the district court; that he had appeared before said district court, been arraigned and plead to the indictment then found against him, and then stood in said court ready for trial, even then, that a *capias* may have been issued for his arrest and placed in the hands of the sheriff. But that would not bring the case within the sections of statute above quoted. The authority there granted to the sheriff or other officer (charged with the duty of arresting a person indicted for a felony) to take the recognizance of such accused party, clearly, by the language as well as the spirit of the statute, depends upon the fact that such indicted person has not been arrested or recognized to appear before the court. In the case at bar the indicted person had not only been both arrested and recognized to appear before the court, but had actually appeared and plead to the indictment and stood ready for trial during the entire term of court. Under such state of case the statute has not empowered the district court to throw the responsibility of taking bail upon the sheriff, either by direct or indirect means. Neither would sound policy permit such power to be conferred.

This proceeding in error is brought by the securities on the recognizance alone, so if they are liable at all they are

liable *stricti juris*, liable of record, and we have seen that the record made against them was made by an officer, who under the circumstances, as shown by the record, was unauthorized by law to make it.

Had the cause in the court below been tried to a jury, it would have been the duty of the court, upon proper request, to have instructed the jury to find their verdict on the theory proved by the record rather than that of the parol evidence. Of this, I think, there can be no doubt. A jury being waived and the cause tried to the court, it should have followed the same line in making its finding. In failing to do so, I think the court erred.

2. It is contended on the part of the defendant in error, that as the "action is founded on an obligation voluntarily entered into and solemnly acknowledged, and for a valuable consideration (the liberty of the accused)" etc., "it is a binding obligation, whether the sheriff had authority to take it or not." In other words, that, conceding that the recognizance was taken without authority of law on the part of the officer taking it, still it is binding as a common law obligation and may be enforced. I have carefully examined the numerous cases cited by counsel on either side upon this proposition. I find two cases, and only two, in which it is squarely held that a recognizance, taken without authority in a criminal case, may be enforced as a common law bond: these are, *The State v. Cannon*, 34 Iowa, 325; and *Dennard et al. v. The State*, 2 Georgia, 137. Neither of these cases is reasoned at all, nor does the Iowa case cite a single authority. The Georgia case cites three very old English and one South Carolina case; the former involving questions of obligation between individuals, and the latter a bond for the support of a bastard. From these and other authorities it is well settled, that in matters between individuals, a bond or other obligation, given by one to the other upon a lawful and adequate consideration, although such bond or obligation may

be deficient in matter of form, or in the manner and time of its execution, acknowledgment, delivery, or filing, yet where it is sufficient to serve its beneficial purpose to the party at whose instance or for whose avail the same is given, it will be held binding according to its terms. But I do not think that these authorities apply to a case like the one at bar. Most of these cases arose upon appeal or forthcoming bonds, where, although a certain sum is fixed as a penalty, to be forfeited upon the failure of the party for whose benefit the obligation is given to prosecute his appeal, etc., or to deliver the property, yet the real measure of damages—the amount for which judgment is rendered on such obligation—is the costs of suit, or the value, use of, or damage to such property within the limit of the penalty named in such bond or obligation, and with no other reference to it. In such case, the cause of action exists independent of the bond or recognizance, and its only office is to fasten liability upon the surety; but in the case of a recognizance for the appearance of an accused person to answer to an indictment, the obligation rests primarily and solely upon the paper itself; and the amount of the judgment is fixed and determined by the penalty named in the paper.

The law does not favor penalties or forfeitures. When exacted the authority therefor should rest upon express law and not upon construction or implication.

To hold that an unauthorized person may accept a recognizance running to the state which will bind the person entering into it, is to hold that one private unauthorized person may make another the debtor of the state, a proposition illogical in theory and dangerous in practice.

While I desire to place this decision rather upon principle than upon authority, yet it must be admitted that the weight of authority on this branch of the case is with the plaintiff in error.

In the case of *Powell v. The State*, 15 Ohio, 579, the

point was squarely presented, and the majority of the court held that a recognizance taken before one of the judges of the court of common pleas—a court composed of three judges—while the court was in session, was void as well at common law as under the statute. This case was followed with approval in the latter case of *The State v. Clark*, Id., 595.

The case of *Williams v. Shelby*, 2 Oregon, 144, was where Williams, as treasurer of the county, sued Shelby as security on a bond executed by him for the appearance of one Patterson to answer to a charge of felony. The bond was taken by a justice of the peace, and it appears from the opinion that there being no law then in force in that state authorizing justices of the peace to take such bonds, it was held by the circuit court void as a statute bond but valid as a common law undertaking. Upon error to the supreme court the judgment was reversed. *Harris v. Simpson*, 14 Amer. Dec. 101 (from 4 Litt. Ky.), is a case in point for the plaintiff in error, but is valuable chiefly for the exhaustive note by Judge Freeman.

This court is now called upon for the first time to decide this point, and while conceding great weight to the argument and authorities cited by counsel for the defendant in error, I do not think that the judgment can be sustained. I think that an appellate court should at all times look to the substance rather than to the form of the proceedings of the court below, but when such proceedings are so deficient, either in form or authority, that they cannot be sustained on the ground intended by statute, then they ought to fail. The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

MAXWELL, CH. J., concurs.

REESE, J., having been of counsel in the court below, did not sit.

D. A. HALE, PLAINTIFF IN ERROR, V. F. P. WIGTON,
DEFENDANT IN ERROR.

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| 20 | 88 |
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| 20 | 88 |
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1. **Pleadings: AMENDMENT.** Where the filing of an amended pleading is necessary to enable a party to prove any cause of action or matter of defense in his case, it is error in the trial court to deny the application of such party to file such amended pleading at any time after the filing of a defective pleading, before or after trial; but otherwise, where such amended pleading is not necessary to the admission of material testimony.
2. ———: **UNNECESSARY WORDS STRICKEN OUT ON MOTION.** Words in a pleading, other than the formal parts thereof, which are not necessary as the foundation of pertinent and proper testimony to prove the action or defense or some part thereof, of the party filing such pleading, may be stricken out on motion at any time before trial; otherwise, where such words are necessary as a foundation for such testimony.
3. **Chattel Mortgage: FORECLOSURE: PAYMENT PENDING SALE: LIEN FOR FEED AND CARE.** Where S. placed a chattel mortgage executed to him by G. M. on a certain horse in the hands of J. M. to foreclose, J. M. placed the horse in his own stable to be fed and cared for, and proceeded to advertise the horse for sale on foreclosure. Pending the sale, S. M., a personal security on the note, to secure which the mortgage was given, tendered to S. the amount due on the note and mortgage, principal and interest. S. accepted the tender and delivered up to S. M. the note and mortgage and ordered J. M. to proceed no further in foreclosing the mortgage. *Held*, That J. M. had no lien on the horse for his feeding and care. [MAXWELL, CH. J., dissents.]

ERROR to the district court for Madison county. Tried below before CRAWFORD, J.

N. A. Rainbolt, for plaintiff in error.

Wigton & Whitham, for defendant in error.

COBB, J. .

It appears from the record in this case that the action in the district court was replevin, brought by the plaintiff

in error as plaintiff against the defendant in error as defendant, for the recovery of the possession of a horse. A trial was had to the court, which found for the defendant: "That at the commencement of this action the defendant had a special property in the horse in controversy and was entitled to the possession of the same. The court further finds the value of such property to be \$68, and the value of the use of the same since the commencement of this action to be \$70," and after overruling a motion for a new trial and one in arrest of judgment, adjudged: "That the defendant have a return of the property taken on said writ of replevin, or in case a return of said property cannot be had, that he recover of said plaintiff the value of defendant's special property therein assessed at \$68, and also, and in either case, that he have and recover of the plaintiff his damages for withholding the same, assessed at \$70, and costs," etc.

It further appears that after the trial and the taking down of the testimony by the official reporter of the court, his notes of such testimony were lost and could not be found, and that thereupon the parties, plaintiff and defendant respectively, stipulated as to the facts and evidence in the case, which stipulation was certified by the judge as the bill of exceptions in the case, and is substantially as follows:

"George Mather, one of the makers of said note and mortgage, set out in the stipulation and admitted to be genuine, is sole principal on said note, and Samuel Mather and Leroy C. Mather are sureties only on said note for said George Mather. Said mortgage and note, after said note becomes due, were placed in the hands of Searles & Kelley, attorneys, by the authority of the owner of said note and mortgage, for collection and foreclosure. Searles & Kelley thereupon placed the said mortgage in the hands of Joseph Martin, with instructions to said Martin to take the property therein named and do all things necessary in

the foreclosure of said mortgage. Immediately thereafter said Martin by virtue of said mortgage took the horse in controversy and proceeded to advertise the same for sale under the mortgage; in the mean time caring for and feeding said horse in his livery stable.

"Before the day fixed for the sale of said horse under said mortgage, and while the said horse was in possession of and being fed and cared for by said Martin, said Samuel Mather, as surety on said note for said George Mather, paid to said Searles & Kelley the full amount demanded by them on said note and mortgage, and said note, endorsed by them in blank by D. Smith the payee and mortgagee, was then delivered to said Samuel Mather by said Searles & Kelley, and the mortgage assigned to said Samuel Mather. Said Martin was then instructed by said Searles & Kelley to proceed no further with the foreclosure of said mortgage. Samuel Mather then, and immediately after payment of said note as above set forth, demanded the possession of said horse from said Martin, but Martin refused to deliver said horse to said Samuel Mather until his charges for taking, keeping, and caring for said horse were paid. This occurred October 12, 1882.

"On or about December 2, 1882, said Martin, not having been paid his charges for taking, feeding, and caring for said horse, issued a notice (set out in said stipulation) addressed to Searles & Kelley, A. P. Pilger (?), Samuel Mather, and D. Smith, setting out the nature of his charges and accruing charges for keeping, feeding, and caring for the said horse, demanding such payment from them, and notifying them that unless the same should be paid within five days from the date of the service of said notice upon them, that he would proceed to sell said horse at public auction to satisfy said claim," etc.

There also appears in the stipulation a copy or exhibit of a notice of a public sale of said horse by said Joseph Mather to satisfy his claim for keeping, feeding, and caring

for said horse, and in which it is recited that the said claim then remained unpaid, and that payment thereof had been demanded and refused. Said notice bears date the 3d day of December, 1882, and by its terms the said sale was to take place on the 19th day of December, 1882, at 10 o'clock A.M., at the barn of said Joseph Mather, at Madison, Madison county, which notice was posted in five public places in the village of Madison, Madison county, for three weeks prior to the day of sale mentioned therein, and was published prior to the time of said sale in the *Elkhorn Valley News*, a newspaper printed in said county and of general circulation. It also appears that, pursuant to said notice, and at the time and place therein mentioned, the said Martin offered said horse for sale at public vendue, and sold said horse to the plaintiff and delivered the possession thereof to him. It further appears that said Samuel Mather did not appear at said sale nor forbid the same.

It further appears from said stipulation that the assignment or transfer executed by the said Samuel Mather, a copy of which is attached thereto, is genuine. By said assignment the said Samuel Mather, under date of the 18th January, 1883, sold and assigned to the defendant all the claim and demand which he, the said Samuel Mather, had against George Mather by reason of him, the said Samuel Mather, having paid as surety the note hereinbefore mentioned, describing the same, together with all the rights and privileges to which he, the said said Samuel Mather, had been subrogated by reason of such payments; together with all his rights and privileges in and concerning the chattel mortgage and the property thereby mortgaged, etc. The said stipulation contains the following further clauses: "It is further agreed that neither Samuel Mather or the defendant have ever been repaid the money paid by Samuel Mather on said note and mortgage."

"On the 20th day of April, 1883, defendant, by his agent, went to the farm of said plaintiff, who had con-

tinued in possession of said horse by virtue of said sale and delivery by said Martin to plaintiff, and took said horse from plaintiff's premises peaceably, but without plaintiff's knowledge or consent, plaintiff then not being present, and said farm then being in the charge of plaintiff's hired hand, who had been instructed by plaintiff to let no one have the horse. Defendant took said horse at said time by virtue of said assignment and chattel mortgage. * * *

"Defendant retained possession of said horse until the 24th day of April, 1883, when plaintiff, by virtue of this action, took possession of the same," etc.

"No tender of any sum was ever made to Joseph Martin or to plaintiff for the care, keeping, and feeding of said property, and no demand for the possession of said property was ever made upon plaintiff unless the facts herein set forth constitute such a demand.

* * * The value of said horse is \$68, and the value of the use of the same during the time it has been in possession of plaintiff by virtue of this action is ——"

It was also stipulated that the court should fix the value of the use of said horse or damages, for its detention, in case it should find for the defendant from the evidence taken on the trial in the hearing of the court, the record of which had been lost.

It appears from the record, that upon the conclusion of the trial, and before the rendition of the judgment by the district court, the plaintiff applied to the court for permission to amend his petition, which was refused, and such order of the court is made a point of error by the plaintiff in his petition in error. This point comes first in order and will be disposed of.

In the case of *Mills v. Miller*, 3 Neb., 95, this court says: "While the entire subject of amendments is in the discretion of the court before which the case is tried, yet it is a legal discretion, and if it should be made to appear to a reviewing court that the amendment sought to be

made, of any pleading, process, or proceeding, is in furtherance of justice, it will be held to be error to refuse such amendment." I do not doubt the correctness of the above. To apply it to the case at bar: If the plaintiff was deprived of the benefit of any principle of law or the application of any item of evidence to which he would have been entitled, had his petition been as he proposed to make it, and which principle of law or item of evidence could, in the opinion of the court, possibly have led to a judgment in favor of the plaintiff in error, the judgment against him ought to be reversed. But was the amendment sought necessary in order to enable the plaintiff to present his entire case? I think not. The plaintiff in his brief says: "We do not now, nor did we at the trial of this cause, consider it necessary to file this amended petition in order to entitle plaintiff to recover, even though the facts proved establish only a special property in the horse in controversy. But if the view held by the district court during the progress of the trial, that 'under the facts proved, plaintiff's claim was but a special property in the horse, and the same not being plead he could not recover,' is correct, then it was error to refuse to allow the amended petition to be filed." Without differing with the plaintiff in the above proposition, I fail to see how the court could have decided the case on the theory that the evidence tended to prove that the plaintiff had a special property and that only in the horse; certainly such could not have been the case, if the testimony given before the court is fairly reproduced in the agreed statement of facts.

As will be more fully discussed further on, Joseph Martin, either in his capacity of agent of Searles & Kelly to foreclose the mortgage mentioned in the agreed statement of facts or as liveryman, having taken said horse to keep, feed, and care for, claimed a lien on said horse for such keeping, feed, and care, and undertook to foreclose such lien by advertisement and sale. The plaintiff at-

tended such sale and became the purchaser of the horse thereat. The notice of sale is, that "I will sell at public auction the above and foregoing described property, or so much thereof as shall be necessary to satisfy my claim," etc. The sale made pursuant to this notice was either an absolute sale of the horse or no sale at all, to be determined by matters to be hereafter considered. The application therefore, on the part of the plaintiff for leave to file an amended petition in this cause, setting up a special property in said horse, and also the special facts and circumstances whereby he became possessed of such special property, was not calculated to lead to the elucidation of the truth, and therefore such amendment would not be in furtherance of justice. Hence to refuse permission to make it was not error.

It seems that the court, on motion of the defendant, struck out certain words from the plaintiff's petition. This is assigned for error.

The words stricken out are those whereby the plaintiff charges the defendant with having "wrongfully and unlawfully entered upon the premises of the plaintiff, and wrongfully took therefrom and from the possession of plaintiff, without plaintiff's knowledge or consent, said property." If these words were necessary as a foundation for any material evidence necessary or proper to the proof of the plaintiff's case, then the striking of them out of the petition was error; otherwise it was, under our system of practice, probably a matter of discretion on the part of the district court, with which this court will not interfere.

Counsel for plaintiff in error takes the position that these words were necessary in the petition to enable him to prove the wrongful taking of the property by the defendant. Was it necessary that he prove the wrongfulness of the taking, or that he prove the taking at all? At common law the action of replevin was frequently spoken of as replevin in the *cepit* and in the *detinet*, according to the facts of the case—the former where the taking of the

property was alleged to be tortious, or wrongful, the latter where the possession of the property by the defendant was admitted to have been lawful in its inception, but its detention was claimed to be wrongful. This distinction does not exist under the code. Now, so far as the defendant's connection with the property is concerned, it is only necessary to allege "that the property is wrongfully detained by the defendant; that it was not taken in execution," etc. The above strictly applies to the affidavit in replevin, but may be taken as indicating the requirement of the petition. Code § 181. *Oleson v. Merrill*, 20 Wis., 487.

I am therefore of the opinion that the district court did not err in sustaining the motion of the defendant to strike the words above quoted from the petition.

But the main question raised by the record is, does the agreed statement of facts, certified as a bill of exceptions, show the plaintiff to be possessed of the right of property in the horse, or the right to its possession? Counsel for plaintiff in error in the brief put it in this wise: "Did Martin's sale transfer title?" This question he answers and argues in the affirmative under three heads—"1, because of the agreement under which he took possession; 2, because Mather acquiesced in the sale; 3, because the property was a pledge in Martin's hands, and the sale was strictly in conformity with the law governing the sale of pledges."

The agreement here mentioned doubtless is the chattel mortgage from George Mather to D. Smith. This is in the usual form of chattel mortgages, and provides, "that in case of default made in the payment of the above mentioned promissory note, or in case of my attempting to dispose of or remove from said county of Madison the aforesaid goods and chattels, or any part thereof; or if at any time the said mortgagee or his assigns should feel unsafe or insecure, then and in that case it shall be lawful for the said mortgagee or his assigns, by himself or agent, to take

immediate possession of said goods and chattels wherever found, the possession of these presents being his sufficient authority therefor, and to sell the same at public auction, or so much thereof as shall be sufficient to pay the amount due or to become due, as the case may be, with all reasonable costs pertaining to the taking, keeping, advertising, and selling of said property," etc.

It is very clear that this contract gave a lien upon the horse, not only for the amount secured thereby, but for all reasonable costs pertaining to the taking, keeping, advertising, and selling the same. But whom did it give this lien to? Doubtless to D. Smith and his assigns. To be sure, by virtue of a provision of the mortgage, its possession was sufficient authority for taking possession of and selling the property. But Martin never had possession of the mortgage in his own right, but only as the agent of D. Smith, the owner. Martin's possession of the mortgage, as well as of the property, was the possession of Smith, his principal. According to the view of the plaintiff in error, Martin became possessed of a lien on the horse for his fees and charges in and about the foreclosing of the mortgage, in his own right, and independent of his principal. I am unable to see it in this light. True, the statute gives a lien for feeding and taking care of live stock in certain cases. Let us examine its language.

Sec. 28. chap, 4, Comp. Stats., reads as follows: "When any person shall procure, contract with, or hire any other person to feed and take care of any kind of live stock, it shall be unlawful for him to gain possession of the same by writ of replevin or other legal process until he has paid or tendered the contract price, or a reasonable compensation for taking care of them." Within the meaning of this language, it is obviously the contract, either express or implied, the procuring, contracting, or hiring which gives the lien, while the feeding and care will furnish the measure of damages for which such lien may be enforced.

Martin did not acquire a lien on the horse, because he was not procured, contracted with, or hired by any other person to feed and take care of it. It is claimed in effect that he was procured by Smith to foreclose the chattel mortgage on the horse, and that the care and feeding of the horse was a necessary incident to the foreclosure of the mortgage. The thing which Smith did through his attorneys, Searles & Kelly, was to appoint Martin his agent to foreclose the mortgage; and without saying that such agency did not carry with it sufficient authority to have empowered Martin to procure, contract with, or hire another to feed and care for the horse pending the foreclosure, so as to give such person a lien therefor under the statute, I do say that as between Smith and Martin the employment was purely a personal one, and no lien could arise thereon under the statute. Smith, through his agent Martin, had possession of the horse, holding him under the provisions of the mortgage for the purpose of foreclosure and sale. He had the right to retain such possession until the amount due on the mortgage for principal and interest and for accrued costs and expenses of foreclosure, so far as foreclosure had been made, had been paid or tendered. But if he choose to accept a less sum, and to deliver up the note and mortgage, his only muniments of title to the horse, he had the power to do so, and to thereby include his agent as well as himself, so far as any lien upon or right to the possession of the horse was concerned. It might be admitted that as against Smith, Martin had a lien upon the horse, or upon Smith's special property in the horse, for his feeding, care, and keeping; and yet when Smith accepted, as in full of all claims under the mortgage, the amount tendered by Samuel Mather, surrendered the note and assigned the mortgage to him, there was no longer any property in the horse to which such lien could attach, and hence such lien ceased to exist.

2. Because Mather acquiesced in the sale.

It appears from the bill of exceptions, that upon the trial the plaintiff offered in evidence, and the court admitted over the objection of the defendant, the notice to Searles & Kelly, A. P. Pilger, Samuel Mather, and D. Smith, referred to in the fore part of this opinion, with the deputy sheriff's return endorsed thereon, of its service upon Samuel Mather and D. Smith.

While it will scarcely be contended that the mere certificate of the deputy sheriff was evidence of the service of this paper, yet as the defendant does not complain in this court of its reception, the service of the notice will be assumed to have been proved. But is the fact that Samuel Mather was served with such notice, and failed to attend and forbid the sale of the horse, sufficient to estop him to deny the legality of such sale? Counsel cites Story's Eq. Jur., § 1546, to this point. I quote the authority cited: "It is a universal law that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no objection to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct." The above, though cited from Story, was taken by that author from the opinion of Lord Chancellor Campbell in the case of *Cairncross v. Lorrimer*, The Jur. N. S., Vol. 7., part I., p. 149. By reference to the opinion it will be seen that the act which was held to work an estoppel in that case was an actual participation in the thing complained of for many years, hence that case furnishes no authority for the case at bar. Upon a somewhat careful examination of cases and works upon the subject of estoppel, I fail to find that mere absence from the place of sale has ever been held to estop such absent party to deny its legality.

3. Because the property was a pledge in Martin's hands, and the sale was strictly in conformity with the law governing the sale of pledges.

If the learned counsel means by the above, as I suppose he does, that the horse was a pledge in Martin's hands for the payment of his care and keeping, then I fail to agree with him at the outset. There is certainly no fact stated in the agreed statement of a pledge to Martin, nor any fact from which it can be presumed that he would either have exacted a pledge as security from Smith for the care and keeping of the horse, or that Smith would have given such pledge. We have already seen, to my own satisfaction at least, that the employment of Martin as agent of Smith to foreclose the mortgage did not of itself amount to a pledge of the horse to him for his pay for his keeping pending the foreclosure, nor give him a lien on the horse therefor.

The district court rendered judgment for the defendant for a return of the property replevied, or in case a return could not be had, that he recover of said plaintiff the value of defendant's special property therein assessed at \$68, and also, and in either case, that he have and recover of plaintiff his damages for withholding the same, assessed at \$70, and costs of suit.

In the case of *Romberg v. Hughes*, 18 Neb., 579, this court, by the present CHIEF JUSTICE, in the opinion, said: "It is only in cases where a return of the property is had that the party to whom the property is returned is entitled to damages for the detention. If, however, a verdict is rendered for the value of the property, the action in that regard being one for damages only, the measure of damages is the value of the property as proved, together with lawful interest thereon from the date of the unlawful taking." Citing *Hainer v. Lee*, 12 Neb., 452. *Deak v. Smith*, 12 Neb., 389.

The judgment of the district court is reversed and

the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

REESE, J. concurs.

MAXWELL, CH. J., dissenting:

I am unable to concur in the opinion of a majority of the court, and will briefly state the reasons for my dissent. In this case the mortgagor had failed to pay the debt secured by the mortgage when it became due, and being in default the mortgagee employed Martin to take the mortgaged property, consisting of horses, and advertise and sell the same under the mortgage. Martin thereupon, by virtue of of the mortgage, took the horses into his possession and cared for them, and was proceeding as rapidly as possible to foreclose the mortgage and sell the property. After considerable expense had been incurred, the plaintiff, as surety, went to the mortgagee and paid him the whole of his demand on the mortgage, and took an assignment of the same. He then demanded the property in question without either paying or tendering to the defendant the costs incurred by him in procuring, feeding, and caring for the horses in question, while the defendant had them in his possession preparatory to a sale of the same under the mortgage. The question presented is the right of the surety to maintain replevin in such case.

The statute provides that "When any person shall procure, contract with, or hire any other person to feed and take care of any kind of live stock, it shall be unlawful for him to gain possession of the same by writ of replevin or other legal process, until he has paid or tendered the contract price, or a reasonable compensation for taking care of the same." In a number of cases this court has held that the legal title to mortgaged property is in the mort-

gagee, subject only to be defeated by performance of the condition. *Adams v. Nebraska City National Bank*, 4 Neb., 373. *Marseilles Manufacturing Co. v. Morgan*, 12 Neb., 69. *Nelson v. Garey*, 15 Id., 535. *Tallon v. Ellison & Sons*, 3 Neb., 74. *Tompkins v. Batie*, 11 Id., 151. The mortgagee, therefore, was the legal owner of the property in question, and as such owner entered into a contract with the defendant to take the property under the mortgage and foreclose the mortgage. This necessarily included feeding and caring for the horses until the sale; and this the proof shows that the defendant did. The surety, by paying the mortgage debt, was simply subrogated to the mortgagee's rights under the mortgage. If the property was being fed and cared for under a contract made with the legal owner, which the proof shows that it was, then the statute declares that such owner shall not maintain an action of replevin until he has paid or tendered the contract price, where the price has been agreed upon, or, where it has not, then a reasonable compensation for "taking care of the same." The assignee therefore takes the property subject to such claims. A different rule nullifies a plain provision of the statute, and by construction denies relief to the very class it was intended to protect, and practically overrules *Guthman v. Kearn*, 8 Neb., 502-508.

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THE STATE OF NEBRASKA, EX REL. WILLIAM H. POOLE,
V. JOSEPH M. ROBINSON.

Constitutional Law: LEGISLATIVE PROCEEDINGS PROVED BY JOURNALS. The proceedings of the legislature are proved by the journals thereof, and if it should appear from them that a bill had not actually passed, the presumption in favor of the certificate of the presiding officers of the senate and house of representatives is overthrown, and the act will be declared invalid. *The State ex rel. Huff v. McLelland*, 18 Neb., 236, followed and approved.

QUO WARRANTO to test the right of respondent to exercise the office of register of deeds in Cass county.

Harwood, Ames & Kelly, and *Chapman & Polk*, for relator.

Crites & Ramsey, and *Lamb, Ricketts & Wilson*, for respondent.

REESE, J.

The leading and controlling question in this case is identical with that in *The State ex rel. Huff v. McLelland*, 18 Neb., 236.

The case has been ably presented by counsel; the whole ground having been closely and thoroughly examined, and cases have been cited which seem to sustain the theory contended for by relator. But after a somewhat careful examination of the question, guided by the light of the constitution and law of this state, we are still of the opinion that the decision in the prior case was correct. The journals of the legislature are made competent evidence by section 418 of the civil code, and by them it is shown that the bill in question was not passed by the legislature.

It could serve no good purpose to re-examine the question or re-discuss the principles involved, as we are satisfied with the reasoning of Judge MAXWELL in *The State v. McLelland*.

It follows that the writ prayed for must be denied and the cause dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

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| 60 | 722 |

PHILLIP HORN, APPELLANT, v. JASON G. MILLER,
APPELLEE.

1. **Appeal: LIMITATIONS AS TO TIME.** In actions in equity either party may appeal from the judgment or decree rendered or final order made by the district court to the supreme court. In order to do so the party appealing shall, within six months after the date of the rendition of the judgment or decree, procure from the clerk of the district court, and file in the office of the clerk of the supreme court, a certified transcript of the proceedings had in the cause in the district court.
2. ———: ———. The time within which to perfect such appeal begins to run at the date of the rendition of the judgment or decree, which is the date on which the court formally announces its conclusion and judgment, and not the date on which the clerk in vacation enters the judgment on the journal bearing the date of the annunciation by the court.

MOTION to dismiss appeal from Cass county district court.

Marquett, Deweese & Hall, for the motion.

Samuel M. Chapman and *George W. Covell*, contra.

REESE, J.

This is a motion to dismiss the appeal in this cause for the reason that the transcript was not filed in this court until more than six months had elapsed after the rendition of the decree.

The record shows that the cause was decided by the district court on the 29th day of April, 1884, and that the transcript was filed in this court on the 18th day of November of the same year—more than six months after the former date.

Upon the part of appellant it is shown by affidavit that the journal entry of the decree was not made by the clerk

Horn v. Miller.

until the 15th day of June, 1884, and upon a suggestion of a diminution of the record a transcript of the proceedings of December, 1885 term is filed showing the following entry:

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| "Phillip Horn, Plaintiff, | } | December term, A.D. 1885. |
| Jason G. Miller, Defendant. | | |

And now on this 19th day of December, 1885, it being the 8th day of said December term, A.D. 1885, this cause came on to be heard upon the motion filed herein, to amend the record so as to show the true date of the entry and enrollment of the final order and decree in said cause, supported by the affidavits of the clerk of this court and of Samuel M. Chapman, Esq. And the court being fully advised in the premises does find the facts set forth in said application, and proofs offered in evidence in support of said motion, to be true, and does order that said record be made to show that said decree and judgment was entered and made of record June 15th, 1884, and that said record be entitled to full force and credit from June 15th, 1884, that being the date of the entry of the same."

The original record and journal entry is in the usual form and appears to have been entered on the 29th day of April, 1884. After the title of the case the recital is as follows:

"And now on this 29th day of April, A.D., 1884, it being the first day of said term of said court, this cause comes on for hearing on the pleadings and evidence, and was submitted to the court; on consideration whereof," etc. Then follows, in the usual form, the decree.

The single question presented is, when was the decree rendered from which the time in which to appeal would be given to run? If from April 29th, 1884, the motion must be sustained. If from June 15th of the same year, it must be overruled. We think clearly the former date. If the decree was rendered of that date the subsequent ac-

tion of the court by another judge could not change the fact.

In *Nuckolls v. Irwin*, 2 Neb., 68, Judge CROUNSE, in writing the opinion of a majority of the court, uses the following forcible language: "The court, prefacing its judgment with the remark that no record of judgment appears, does not destroy the fact, if one did appear. We will suppose the court to have overlooked it, or to have been misled by counsel. To call a judgment a finding makes it none the less a judgment. A summons is not an execution nor an almanac a pleading, even if called so on authority of a court." If the decree was rendered on the 29th day of April, 1884, the proceedings of December 19th, 1885, could not change the fact.

But the facts in this case are conceded to be that the decree or decision of the district court was announced from the bench on the 29th of April, but that the journal entry was not written until the later date, at which time the court was not in session.

Bouvier, under the sub-head of *Requisites of Judgment*, says: "To be valid, a judicial judgment must be given by a competent judge or court at a time and place appointed by law, and in the form it requires." Now, if the court was not in session, or the judge not in the county, on the 15th of June, it can hardly be claimed that a judgment or decree could be rendered on that day.

"A judgment is the final determination of the rights of the parties in an action." Civil code, section 428. That determination must be made while the judge is present and the court in session. "All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action." *Id.*, sec. 448.

"When the judicial acts or other proceedings of any court have not been regularly brought up and recorded by the clerk thereof, such court shall cause the same to be made up and recorded within such time as it may direct.

When they are made up, and upon examination found to be correct, the presiding judge of such court shall subscribe the same." *Id.*, 447. This evidently includes judgments and decrees. 'Section 675 provides: "That in actions in equity either party may appeal from the judgment or decree rendered, or final order made by the district court, to the supreme court of the state; the party appealing shall, within six months after the date of the rendition of the judgment or the decree, or the making of the final order, procure from the clerk of the district court, and file in the office of the clerk of the supreme court, a certified transcript of the proceedings had in the cause in the district court, containing the pleadings, the judgment or decree rendered or final order made thereon, and all the depositions, testimony, and proofs offered in evidence on the hearing of the cause, and have the said cause properly docketed in the supreme court; and on failure thereof the judgment or decree rendered or the final order made in the district court shall stand and be proceeded in as if no appeal had been taken."

It must be observed that the transcript must be filed in the supreme court within six months from the "date of the rendition of the judgment or decree." That date was April 29. The court must render the judgment or decree, while the clerk, whose acts are ministerial only, must enter them upon the records, thereby perpetuating the evidence of the fact.

Rendering a judgment is the annunciation or declaring the decision of the court indicated by the rule for judgment. *Fleet v. Youngs*, 11 Wend., 528. See also *McCourtney v. Fortune*, 42 Cal., 387.

In Freeman on Judgments it said that: "Expressions occasionally find their way into reports and text-books indicating that the entry is essential to the existence and force of the judgment. These expressions have escaped from their authors when writing of matters of evidence

and applying the general rule that in each case the best testimony which is capable of being produced must be received, to the exclusion of every means of proof less satisfactory and less authentic. The rendition of a judgment is a judicial act; its entry upon the record is merely ministerial. A judgment is not what is entered, but what is ordered and considered. The entry may express more or less than was directed by the court, or it may be neglected altogether; yet in neither of these cases is the judgment of the court any less *its* judgment than though it was accurately entered. In the very nature of things the act must be perfect before its history can be so; and the imperfection or neglect of its history fails to modify or obliterate the act. That which the court performs judicially, or orders to be performed, is not to be avoided by the action or want of action of the judges or other officers of the court in their ministerial capacity." Sec. 38.

In speaking of the entries of judgments in the judgment books the same author says: "The authority of the clerk to make this formal entry is founded on a judgment already valid, and whose validity is not destroyed by his failure to enter it. * * * In many cases the record is not completed until after the adjournment of the term, and this practice seems to have prevailed at common law. As the judgment is final before its formal entry in this book, a statute providing that an appeal may be perfected within a specified time from the 'rendition' of the judgment, certainly commences to run from the time of the drawing up and signing of the judgment, and filing it among the papers in the case."

"The language used, in the opinion of the court, in the case of *Genella v. Relyea*, 32 Cal., 159, though not necessary to a decision of that case, is worthy of citation as founded upon reason. It indicates that the time for appeal begins to run, though no judgment be filed. 'The court announced its judgment, and the order for judgment

Horn v. Miller.

was entered in the minutes of the court on the 15th of August, 1865. The judgment was therefore rendered and the time for taking an appeal commenced to run on that day.'” Sec. 40.

The practice of the judge, writing out, signing, and filing with the clerk, his decisions does not obtain in this state as in many others, but instead thereof, the law provides for a trial docket (Sec. 321 Civil Code) which in effect supersedes the necessity of the judgment roll, or other memoranda by the judge. The formality of drawing up, signing and filing of judgments and decrees by the trial judges, and incorporating them in the judgment rolls, has been wholly abandoned. The court announces its conclusions, renders its judgment, and makes a memorandum thereof in the trial docket, which serves as a guide to the clerk in the performance of the ministerial part of writing the judgment or decree in the journal.

The judgment or decree is *rendered* by the *court*. From “the date or rendition of the judgment or decree” the time within which to appeal begins to run.

Nor can the provision of the section referred to, which requires that the transcript shall contain a copy of the judgment or decree, serve to extend the time by reason of a failure of the clerk to make the proper entries at the time of its rendition. The law requires him to enter the judgments and decrees upon the journal, and, as we have seen, provides that he may be required to do so by the court, or judge, without any proceedings being instituted by interested parties to compel action. The question as to what would be the effect in case of the absence of the clerk from the state, or his refusal to journalize the proceedings of the court, does not arise in this case, for it appears that ample time intervened between the entry of the decree upon the journal and the expiration of the six months within which the appeal might have been perfected. In such case the right to appeal cannot be destroyed by the default of

the court. *Dobson v. Dobson*, 7 Neb., 296. But in a case where a party has not been deprived of the right by the act of the court or its officers, and where sufficient time has elapsed in which to procure a transcript of the recorded entries, the court has no power to extend the time in which an appeal may be taken. *Nuckolls v. Irwin*, 2 Neb., 65. *Glore v. Hare*, 4 Id., 131.

In *Glore v. Hare*, it is said by Chief Justice LAKE, that "if the clerk below fails to make up the transcript in time, the appellant should appear here and suggest that fact. If he files transcript after the time prescribed he cannot complain of the negligence of the clerk."

It is apparent that the appeal was not taken "within six months after the date of the rendition of the decree," as is required by the statute, and the motion to dismiss will be sustained.

MOTION SUSTAINED.

COBB, J., concurs.

MAXWELL, CH. J., dissenting:

I am unable to give my assent to the opinion of the majority of the court for the following reasons; This action was brought by Miller against Horn in ejectment, to recover the possession of one hundred and sixty acres of land. It is a purely legal action, as he claims to be the owner through a sheriff's sale. Horn is in possession and claims the legal title derived from one Acheson, whose title Miller claims he obtained through the aforesaid sheriff's sale. It is thus a contest between legal titles, in which the entire controversy may be determined at law, and where Miller is entitled under the statute to submit his case to the determination of a jury and to have at least two trials in the case. The rule is well settled that a suit in equity will not be maintained to take the place of the action of

ejectment and to try adverse claims and titles to land which are wholly legal, and to award the relief of the recovery of possession. *Wolfe v. Scarborough*, 2 O. S., 361-368. *Woodruff v. Robb*, 19 Ohio, 212-214. *Welby v. Duke of R.*, 6 Bro. P. C., 575. *Hill v. Proctor*, 10 Wa. Va., 59-77. *Cavedo v. Billingo*, 16 Florida, 261. *Strubher v. Belsey*, 79 Ill., 307. *Phelps v. Harris*, 51 Miss., 789-793. *Lewis v. Cocks*, 23 Wall., 466-469. *Boston D. Co. v. Florence Manuf. Co.*, 114 Mass., 69. *Whitehead v. Kitson*, 119 Mass., 484. *Griswold v. Fuller*, 38 Mich., 268. *First Nat. Bank v. Bininger*, 26 N. J. Eq., 345. *Wolcott v. Robbins*, 26 Conn., 236. *Green v. Spring*, 48 Ill., 280. *Roberts v. Taliaferro*, 7 Iowa, 110-112. *Shotwell v. Lawson*, 30 Miss., 27. *Bobb v. Woodward*, 42 Mo., 482-488. *Waddell v. Beach*, 1 Stockton Ch., 793-795. *Milton v. Hogue*, 4 Ire. Eq., 415-422. *Pell v. Lander*, 8 B. Mon., 554-558. *Dickerson v. Stoll*, 4 Halst. Ch., 294-298. *Doggett v. Hart*, 5 Florida, 215. *Topp v. Williams*, 7 Humph., 569. *Hale v. Darter*, 5 Humph., 79. *Hipp v. Balin*, 19 How., 271-277. *Bowers v. Smith*, 10 Paige, 193-200. 1 Pom. Eq., § 177.

This suit of *Horn v. Miller* being one in which it was sought to enjoin Miller from proceeding at law, when, whatever defense Horn may have to the action may be set up in the ejectment case, the court was without jurisdiction, and the judgment of the court below dismissing the bill is no doubt right, and the case at law will proceed. So that it is apparent that whatever the ruling upon this motion may be, the final result would be the same—a dismissal of the bill.

I am unwilling, however, to give a construction to the language regulating the right of appeal in equity cases, which it seems to me is at variance with the liberal rules heretofore adopted by this court, that in the language of the first section of the code "its provisions and all proceedings under it shall be liberally construed with a view to

promote its object and assist the parties in obtaining justice."

Sec. 675 of the code provides that "the party appealing shall, within six months after the rendition of the judgment or decree, or the making of the final order, procure from the clerk of the district court and file in the office of the clerk of the supreme court, a certified transcript of the proceedings had in the district court containing the pleadings, the *judgment or decree* rendered, or final order made thereon," etc. Now, it is said that the decree is rendered as soon as it is announced. This for certain purposes is no doubt true, but that it does not apply in cases of appeal is evident from the requirement of the statute that a copy of the decree is to be filed in the supreme court. As a rule the appellant is not the party whose duty it is to prepare the decree. It is for the party claiming the benefit of such decree to see that it is prepared and entered, and until it is so entered it is not, in my view, rendered within the meaning of the statute. It is proved beyond controversy that the appeal in this case was taken within six months from the actual entry of the decree, a copy of which is set out in the record. The time from which an appeal may be taken dates from the *actual* rendition of the decree, and not from the fiction of the law when it was supposed to have been rendered. The reasons given for the opposite holding fail to convince me that a party should be required to incur all the expenses of procuring a transcript of all the proceedings in a case in the district court, including the decree, and file the same in the supreme court before, in fact, any decree is found on the records of such court from which to appeal.

The motion, therefore, should be overruled.

BARNABAS E. SWIFT ET AL., APPELLEES, V. CHARLES
H. DEWEY ET AL., APPELLANTS.

1. **Mortgage on Homestead.** A mortgage of a tract of land, including the homestead, executed by a married man without the concurrence and signature of the wife, is invalid for the purpose of impairing, dismembering, or in any manner affecting such homestead or its appurtenances; but *aliter* as to the portion of such tract, if any, not embraced within such exempt homestead.
2. **Jurisdiction.** When a district court has gained jurisdiction of a cause for one purpose, it may and should, retain it generally for relief.

APPEAL from the district court of Adams county.
Heard below before MORRIS, J.

John L. Webster and *B. F. Smith*, for appellants.

John M. Ragan (*Angus McDonald* and *O. P. Shallenberger* with him), for appellees.

COBB, J.

It appears from the abstract that on the 4th day of June, 1879, Barnabas E. Swift, one of the appellees, was the owner of the quarter section of land described in the pleadings. That the same having been acquired by him under the homestead laws of the United States, although he was not then actually residing thereon with his family, yet not having legally abandoned the same as his homestead, both he and his wife and co-appellee were entitled to an exempt homestead therein. It further appears that on the day above mentioned the said Barnabas E. Swift executed to Dewey & Stone, the appellants, a mortgage upon the north half of said quarter section of land to secure the sum of \$819.22. That on the 13th day of December, 1880, a

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| 51 | 422 |
| 53 | 68 |

suit having been commenced for the foreclosure of said mortgage, such proceedings were had, that a judgment and decree was duly rendered and entered in the proper district court for the foreclosure of said mortgage, and the sale of the land therein described. That on the 29th day of September, 1884, an order of sale was issued on the said judgment and decree, and placed in the hands of the appellant David L. Barlass, as sheriff of Adams county, who advertised the said lands for sale on the 1st day of November next ensuing, to satisfy the said judgment and costs, etc. That thereupon the appellees commenced their action in the district court of Adams county for an injunction and general relief against the appellants.

The appellants Dewey & Stone answered, denying that the said quarter section of land was the exempt homestead of the said plaintiffs at the time of the commencement of their said action, and alleging that the same was of greater value than two thousand dollars, to-wit, of the value of four thousand dollars, and praying the court to enquire into the value of said quarter section of land, and if the same should prove to be of greater value than two thousand dollars, that the same be sold and the overplus of two thousand dollars be applied to the payment of the said judgment of the said Dewey & Stone, etc.

There was no reply.

There was a trial to the court which found for the plaintiffs and rendered a judgment and decree perpetually enjoining the said defendants from proceeding further in the sale of said premises, or taking any steps, proceedings, or process whatever, based on said pretended judgment of foreclosure, etc. The defendants bring the cause to this court by appeal.

Section 3 of the homestead act of 1877, provides that: "A conveyance or encumbrance by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument." Laws 1877, 34.

I do not understand this provision to go to the extent of invalidating a mortgage executed by the husband without the concurrence of the wife, and embracing an exempt homestead, for all purposes, but only for the purpose and to the extent of rendering it powerless to dismember or to any extent disturb the homestead. Certainly such a mortgage, if executed for an adequate and lawful consideration, would be enforceable against the person executing it, according to its terms, upon any property which it might contain other than the exempt homestead. This proposition seems to me too plain to admit of argument.

The act of 1877 provides that a homestead shall in no event exceed in value the sum of two thousand dollars. The previous act of 1875 and the subsequent one of 1879 [Comp. Stat., Ch. 86.], both contain provisions of similar import. Under this provision, and conceding that under the evidence in the case, the appellees have an exempt homestead in the quarter section of land described, it by no means follows that the whole quarter section is exempt. Where, as in this case, the homestead in question consists of a farm, that which may be claimed as exempt is as clearly limited to two thousand dollars in value, as it is to one hundred and sixty acres in quantity. It should be borne in mind, in considering this case, that it nowhere appears, either in the pleadings or evidence, that the dwelling house and its appurtenances, or either of them, is situated upon the eighty acre tract of land covered by the mortgage, nor does it anywhere appear that the eighty acres of said quarter section of land not covered by the mortgage does not embrace the dwelling house and all of its appurtenances, nor that it is not worth the full amount of two thousand dollars. On the other hand, while it is not alleged in the answer that the eighty acres covered by the mortgage does not embrace the dwelling house and its appurtenances, it is alleged therein that the quarter section of land is of greater value than two thousand dollars, and that it is worth four thou-

sand dollars. Upon the trial the defendants offered no evidence on their part, but they did seek, by interrogating the plaintiffs, when on the stand as witnesses in their own behalf, to prove the said quarter section of land to be of greater value than two thousand dollars, and that it was of the value of four thousand dollars. The questions by which it was sought to draw out this evidence being objected to by the plaintiffs as incompetent, and such objections being sustained by the trial court, is probably a sufficient reason and justification on the part of the defendants for the absence of such evidence.

The right of the defendants Dewey & Stone to proceed against the property of the plaintiff, Barnabas E. Swift, were the same as those of a judgment creditor, neither greater or less. Section 14, of the act of 1877, provides as follows: "When a disagreement takes place between the owner and any person adversely interested as to whether any land or buildings are properly a part of the homestead, the sheriff shall, at the request of either party, summon nine disinterested persons having the qualifications of jurors; the parties then, commencing with the owner of the homestead, shall in turn strike off one juror each, and shall continue to do so until only three of the number remain. These shall then proceed as referees to examine and ascertain all of the facts of the case, and shall report the same, with their opinion thereon, to the next term of the court from which the execution or other process may have issued." The following three sections point out the duties of the court upon the coming in of the report of such arbitrators, etc.

Plaintiffs in their brief contend that the above quoted section "provides a plain way in which any one adversely interested may have any question as to the quantity or value of any homestead decided, and have the excess (if any) set off so that it may be reached by judicial process." And that "where such a statutory remedy is provided no other method can be resorted to, to determine that question," etc.

I do not doubt the correctness of the rule that "where a statute confers a right and prescribes adequate means of protecting it, the proprietor of the right is confined to the statutory remedy," but I think that it would have been equally applicable had it been invoked by the defendants in defense to the plaintiffs' petition for injunction. Clearly the defendants Dewey & Stone could not have proceeded under the statute without first having obtained their decree, caused the order of sale to issue, and placed it in the hands of the sheriff. It was then equally the right of the defendants Dewey & Stone or of the plaintiffs to apply for the jury provided for by section 14 above quoted. Neither party availed themselves of that right, but the plaintiffs brought this suit in equity. So that at the instance and procurement of the plaintiffs themselves the district court of the proper county, sitting as a court of equity as well as of law, obtained jurisdiction of the cause as well as of the parties. Such being the case, the defendants, appellants, by their answer invoked the well known powers of the court that the facts of the case and rights and duties of the parties in respect thereto might be enquired into, ascertained, and settled by its decree. This I think they had a right to, and that in denying it to them the district court erred.

"It has been laid down in the courts of New York on more than one occasion as a settled rule, that when the court of chancery has gained jurisdiction of a cause for one purpose, it may retain it generally for relief." See 1 Story Eq. Jur., § 71, and cases there cited. This I think may be now regarded as the settled law. It tends to shorten litigation and save costs, while it denies the rights of no one.

The findings and decree of the district court are reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

ELLEN REAL ET AL., PLAINTIFFS IN ERROR, V. JOHN A.
HOLLISTER, DEFENDANT IN ERROR.

1. **Covenant. WARRANTY: PLEADING AND PROOF.** In an action on a warranty deed for a breach of the covenant for quiet enjoyment, the plaintiff must allege and prove that he has been turned out of the possession of the granted premises, or of some part thereof, or has yielded the possession thereof to the paramount title.
2. **A Motion for a New Trial** must be made in the terms substantially in which it may be allowed, within the rules of law, or it will be denied.
3. **Covenant.** The covenant for title, or of seizin, is an assurance to the purchaser that the grantor has the very estate, in quantity and quality, which he purports to convey. If he has not such title, his covenant is broken immediately upon its being made.

REHEARING of case reported in 17 Neb., 661.

O. P. Mason, for plaintiffs in error.

Ryan Brothers, for defendant in error.

COBB, J.

This cause came before the court and was argued at the January term, 1885. The judgment was affirmed at the succeeding July term, and the opinion of the court, by our brother REESE, published in 17 Neb., 661. At the January, 1886, term, a motion for a rehearing was made by the plaintiffs in error, and allowed by the court, and the cause thoroughly reargued.

It appears from a statement in the brief of counsel for the plaintiffs in error, that the attention of counsel was by the chief justice directed principally to the two following points:

1. The necessity of an eviction before bringing suit; and

2. That the husband, who so far as appears did not have an interest in the land, shall be held merely as security.

Before entering upon the discussion of either of these points I will say that, as I understand it there is yet another, and as I had thought the principal, question involved in the case, to-wit: whether, under the facts proved in the case, the covenants of seizin of both or either of the plaintiffs in error run with the land so as to be available as a cause or causes of action in favor of the defendant in error.

Upon the first point, the fifth point of the syllabus of the original opinion is as follows: "where in an action upon the covenants of warranty of title, contained in a deed of conveyance of real estate, it is shown that a decree in equity has been entered against the grantee and plaintiff setting aside his title, and declaring that he held as trustee for the plaintiff in that action and requiring conveyance to such plaintiff; and where, after such decree, the plaintiff in the action conveys the land to a third party, who in an action of ejectment recovers judgment against the present plaintiff for the possession of the property, *Held*, Sufficient proof of eviction."

As will be seen when we come to examine the third point, the only covenant contained in the deed of plaintiffs in error which can be deemed available to the defendant in error is that contained in the following words: "they do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever." This I think is equivalent to a covenant for quiet enjoyment as it is usually designated in the cases and law books. So that those cases which were brought for a breach of the covenant for quiet enjoyment will be regarded as specially applicable to the case at bar.

Upon the question as to what will constitute an actionable breach of the covenant for quiet enjoyment, Greenleaf says, "The covenant for *quiet enjoyment* goes to the possession and not to the title; and therefore to prove a

breach, it is ordinarily necessary to give evidence of an entry upon the grantee, or of expulsion from, or some actual disturbance in the possession; and this, too, by reason of some adverse right existing at the time of making the covenant, and not of one subsequently acquired." 2 Greenl., § 243.

On the same subject Kent says, "But the covenant of warranty and the covenant for quiet enjoyment are prospective, and an actual ouster or eviction is necessary to constitute a breach of them." 4 Kent Com., 471, and authorities there cited.

A patient examination of authorities cited by counsel, as well as those cited by the above writers, satisfies me that the weight of authority, as well as of reason, is with the proposition that in order to maintain an action for the breach of the covenant for quiet enjoyment, the plaintiff must allege and prove that he has been actually turned out of the premises by legal process based upon a title or some right existing in another at the date of the covenant, or that such outstanding title having been asserted he has yielded to it and surrendered the possession thereto. In the former case the record of the judgment and service of the writ of possession would be conclusive evidence of the superiority of such outstanding title, but in the latter case the plaintiff would assume the burden of proving it by legal and appropriate evidence. Yet in the latter case, if the title to which the plaintiff has yielded has been established by the judgment or decree of a court of competent jurisdiction, the record would be conclusive proof of such title, and the surrender to it only need be proved as an independent fact.

It will be observed that this rule does not "require a person in possession, after his title has been destroyed by decree in equity, and a judgment of eviction has been rendered against him by a court of law, to still refuse to surrender possession, and have to pay the costs of an eviction by execution," but it does prohibit him from suing on the covenants

of his deed while he continues to enjoy the possession obtained under it. I will not say that the reasons for the rule which requires a party to be turned out or to render up the possession of premises, before bringing suit on the covenant of a deed for their quiet enjoyment, are many or conclusive, but I think that such ouster or surrender may be required as a pledge of good faith.

The only allegation of ouster or dispossession contained in the petition is the following: "That on the 20th day of November, 1882, a trial was had, and plaintiff herein was by the judgment of the court ordered evicted, and was evicted from said premises," etc. There was no evidence before the court of the dispossessing of the plaintiff or of his surrender or abandonment of the premises. The record of the judgment in ejectment was before the court. But I do not think that sufficient.

As to the second point, that the husband, who so far as appears did not have an interest in the land, shall be held merely as security, I have not deemed it necessary to decide. I am entirely satisfied with what is said in the original opinion on that subject. Were that the only point in the case, although it be admitted that P. J. Real was improperly joined as a defendant, yet he cannot complain of the action of the court in overruling the motion for a new trial. The finding being correct as to Ellen Real, a motion to set it aside must be overruled; and so the motion, being an entirety as to both defendants, was properly overruled as to both. P. J. Real never asked the trial court to set aside the finding as to himself alone, but encumbered his motion so that the court could not grant it in the terms in which it was applied for without also setting the finding aside as to Ellen Real, which as to this point would have been an obvious error. It is a rule of pleading, nearly if not quite without an exception, that a motion must be made in the precise terms in which it may be granted, or it will be denied.

I have above considered the cases as though the covenant for quiet enjoyment contained in the deed from the plaintiffs in error to Michael Real was the only covenant in said deed available to the plaintiff in the court below; but that depends upon whether, under the evidence in the case, the covenant of seizin contained in said deed can be held to have run with the land so as to have passed to the plaintiff below by virtue of the deed from Michael Real to him. It appears from the bill of exceptions that the land described in the pleadings constituted a part of the grant by the United States to the State of Kansas, to aid in the construction of the Northern Kansas railroad and telegraph, but that after the line of said railroad became definitely fixed, and the said grant operative, one Linas Clapp entered the same under the homestead law and received a patent therefor from the United States. That said Clapp conveyed the said land by deed to one R. P. Walker; that said Walker conveyed it to Ellen Real, the female plaintiff in error, who, together with her husband, the other plaintiff in error, conveyed it to one Michael Real by the warranty deed now under consideration, and Michael conveyed it to the defendant in error. Also, that on the 21st day of February, 1882, in an action pending in the circuit court of the United States in and for the district of Nebraska, wherein James W. Parker was plaintiff, and John H. Hollister (defendant in error herein) impleaded with the Phoenix Mutual Life Insurance Company, was defendant, it was ordered adjudged and decreed that the St. Joseph and Denver City Railroad Company had become and was entitled to letters patent of the United States, conveying to it the lands in the original bill in said cause described, being the same land as that conveyed by the deed now under consideration, but that such patent was issued to another party, who took the same and the title to said lands in trust for said company, and not otherwise, and that the defendant in said action, to-wit, the defendant in error herein,

then held the legal title to said lands under the said patent in trust for the plaintiff in said action.

It appears then to be settled by the judgment of a court of competent jurisdiction, in a cause in which defendant in error was a party, that at the date of the execution of the deed containing the covenant, for the breach of which defendant in error sues, whatever title the plaintiff in error had or held in or to the said land was held by Ellen Real as a trustee in trust for the St. Joseph and Denver City Railroad Company, and not in her own right, and it does not appear, either from the bill of exceptions, or otherwise, that either of the plaintiffs in error were ever in the actual possession of the said land. So, were we inclined to hold with Maine and Massachusetts, and as held to a qualified extent by Ohio, that possession of the granted premises by the covenantor is sufficient to cause the covenant of seizin to run with the land (see Rawle on Covenants for Title, p. 76), even then there are no facts in this case for the application of such rule. I do not lose sight of the rule that the holder of the general title of unoccupied land will be presumed to be in possession, but I know of no rule under which a tract of land, proved to be partly cultivated, will be presumed to be unoccupied, and there is no evidence on that point in the case at bar. Ordinarily, and doubtless in the cases out of which the above mentioned rule grew, the legal and equitable title were united in the same person, but in the case at bar it was proven that it had been in effect adjudicated that the equitable title was never in either of the plaintiffs in error, but passed by grant from the United States to the railroad corporation under which George M. Wood holds an unbroken chain of title.

I stated in the fore part of this opinion that under the facts of this case the only one of the covenants contained in the deed of the plaintiffs in error (available to the defendant in error) was that for quiet enjoyment, and we have seen that he cannot avail himself of the alleged breach

of that covenant, for the reason that for aught that appears to the contrary he is in the possession and enjoyment of the premises in the deed which he now seeks to attack.

The covenant of seizin, or covenant for title, as it is sometimes called, is not available to him, for the reason that it having been broken at the moment it was made, it becomes a personal cause of action in Michael Real, and did not run with his deed to the defendant in error. This is true, unless the seizin named in the said deed means the naked legal title which existed in Ellen Real by virtue of the wrongful issuance of the patent of said land by the United States officers to the said Linas Clapp. I think it means more than that.

The court of King's Bench, by Lord Ellenborough, in *Howell v. Richards*, 11 East., 633, says: The covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey."

The deed now under consideration, I think, purports to convey the land absolutely, not only the legal but the equitable title to the whole quarter section. As it failed to convey such title, the covenant for the title or seizin being broken, failed to run with the land, and so did not pass from Michael Real to the plaintiff in the court below; and not being a cause of action accruing to him, the finding of the district court thereon in his favor was erroneous.

We have seen above that the finding of the district court in favor of the plaintiff in that court on the covenant for quiet enjoyment cannot be sustained, for the reason that there is no evidence of the said plaintiff having been turned out, or of his having yielded up the possession of said premises in response to a claim under a superior title. But it appears from the record that the defendant in error has expended the sum of sixty-four dollars and fifty-three cents, which was adjudged against him as costs in two sev-

eral suits against him by the holders of the paramount title to the said lands, and the claim of said defendant in error to recover the said sum, not being resisted by plaintiffs in error, but being admitted by counsel in the brief, upon the entry of a remittitur by the defendant in error, either in this court or the court below, within sixty days from the date of the filing of this opinion, of the whole of the judgment in the district court, except the sum of sixty-four dollars and fifty-three cents, the said judgment will stand affirmed as of that amount; otherwise the said judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with law.

JUDGMENT ACCORDINGLY.

MAXWELL, CH. J., concurs.

REESE, J., dissents. And for grounds of dissent refers to the original opinion.

THE STATE OF NEBRASKA, EX REL. W. W. WOOD, v
ABEL HILL ET AL.

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| 31 | 198 |
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| 34 | 63 |
| 20 | 119 |
| 46 | 674 |

Elections: CANVASSING VOTE. Where the election returns in due form are made by the judges and clerks of an election, and the poll book so returned shows the entire number of votes cast at the election, and the tally sheet the number cast for a particular candidate, it is the duty of the board of canvassers to canvass the votes so returned, and to correct any error of the election board, apparent on the face of the returns, in adding up the votes cast for a candidate.

ORIGINAL application for mandamus.

Marquett, Deweese & Hall for relator.

C. E. Magoon for intervenors.

MAXWELL, CH. J.

This is original action to compel the defendants to re-assemble as a board of canvassers and canvass certain votes from Hunter precinct in Sheridan county. It appears from the record that Sheridan county was organized in September, 1885; that at the election organizing the county no place received a majority of the votes cast for county seat, and a second election was called, and held in said county, for the purpose of locating a county seat, on the 6th day of October, 1885. At this election, the relator claims the whole number of votes cast for the county seat was 1,758, of which Rushville received 919 votes, and Hay Springs 839, and that the votes were duly canvassed by the judges of election for the respective precincts; that the returns were made to Abel Hill, the county clerk, and he called to his aid two disinterested electors, viz., William Waterman and James F. Loofborough, who canvassed all of the votes returned, except from Hunter precinct. That the returns showed the number of votes cast in said precinct to be 226, and that all of said votes were in favor of Rushville, but that said board only counted 42 of said votes instead of 226, leaving 184 uncounted.

Edward Satterlee, George W. Millard, J. E. Brown, and J. R. Graham, residents and tax-payers of said county, were permitted to intervene, and filed an answer, wherein they allege that, "in said Hunter precinct, in said county, the total number of ballots cast at said election on said question was forty-two, and no more;" which votes were all for Rushville, and were canvassed. It is also alleged, in substance, that the 184 votes not counted were false and fraudulent, and that the total number of electors in Hunter precinct at the date of said election did not exceed nineteen.

Loofborough and Waterman, in their answer, as a reason for not canvassing all the votes returned from Hunter pre-

cinct, say: "That said poll book showed the names of two hundred and twenty-six persons who voted in said Hunter precinct, written down in regular order in the first part of the poll book, headed, "Names of Voters;" that the tally list returned with and belonging to said poll book from Hunter precinct was as follows: Under the headings "Name of Office" and "Name of Person voted for," was written, "For County Seat, Rushville," and immediately thereafter were two hundred and twenty-six tallies; that said tally sheet contained no other written words or figures; that in that part of said poll book where the form requires the number of votes received for each person to be written in figures and words there was written, "For County Seat, Rushville, 42," in figures, and "forty-two" in words; that said poll book and tally sheet were certified to in regular form by the clerks and judges of election, and that there was no indication on said poll book, or on the tally sheet, or on any other place, that any other place except Rushville was voted for for county seat."

A large amount of testimony has been taken in the case, the important points of which will be noticed.

Henry Bremer, one of the judges of the election in Hunter precinct, testifies, in substance, that he was present at the election and assisted in canvassing the votes, and that after the canvass the returns were put in the ballot box and the box locked; that the votes were folded up and put on a string, and placed in an envelope and sealed up; that the returns were left in his possession, and were placed in a trunk, and the trunk locked, and that he delivered said returns to the county clerk on the fourth day after the election; that the returns were in the same form when delivered to the county clerk as when the vote was canvassed, and had not been handled, examined, or changed by himself or any other person during the time they were in his possession. Thomas Preston, the other judge of the election, was also sworn, and testifies, in substance, that the

names of the voters, the number of ballots on the tally sheets, and the ballots cast, all corresponded in number with the whole number of votes certified to as being cast, and that there were either twenty-two or forty-two votes cast at said election, he could not "be positive as to the exact number." He also on cross-examination states he is unable to swear to the exact number of votes cast at the election, and that no change in the returns had been made, "to the best of his knowledge," when they were delivered to Bremer, the other judge. The testimony tends to show that Preston frequents saloons; that on at least two occasions in such saloons, where it is shown that he had been drinking, he had stated, in the presence of two witnesses, that he had been offered \$500 to give his testimony in favor of one of the parties. He does not deny having made said statements, but says he "don't recollect of ever saying any such words." His testimony amounts to but little, even if given full force and effect; but if it was important, there is sufficient doubt cast upon it from the manner in which it was given, and the circumstances, as the witness himself describes them, to lead us to place but little reliance upon it.

It appears from the testimony that Hunter precinct extends "from the north line of town thirty to the south line of town twenty-four, taking in ranges forty-three and forty-four," being forty-two miles in length by twelve in width. No witness has testified that he was acquainted with the people in the entire precinct at the time of the election, and that the persons named in the poll list as having voted at said election did not reside in such precinct. General allegations will not do. All presumptions are in favor of the returns, and unless it is shown that they are fraudulent—not, in fact, returns—it is the duty of the board to canvass the vote so returned. The failure of the judges or clerks of election to add up the number of votes cast correctly will not preclude the board of canvassers from correcting the error where, on the face of returns, it is

apparent that there is a mistake. That is one of the objects of requiring a return of one of the poll books and tally lists. The poll books show the names of the persons purporting to have voted at the election, while the tally list shows the tallies or votes cast for particular candidates, as they were counted when taken from the ballot box. If 226 votes were actually cast at the election in controversy, as shown by the names of those purporting to have voted at said election, and by the tallies of votes cast thereat, it will not be seriously contended that a failure to add the number correctly will preclude the board of canvassers from making a correct computation. The board of canvassers cannot go behind the returns and sift out the names of voters claimed to be illegal. For this purpose the law provides another remedy; but they are to canvass the votes as returned to them, and if a mistake has been made by the election board in the mere addition of the votes cast for a particular candidate, as shown from the tally list and poll book, it is the duty of such board of canvassers to correctly add the same together; and in case they fail to do so they may be compelled to act. A peremptory writ of mandamus will therefore issue, requiring said defendants to re-assemble and canvass all the votes returned from Hunter precinct.

JUDGMENT ACCORDINGLY.

THE other judges concur.

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GILEAD P. CHENEY, APPELLANT, v. O. D. WOODRUFF
ET AL., APPELLEES.

- 1. Limitation of Actions: MORTGAGE FORECLOSURE.** The act of 1869, by extending the period of limitation of mortgages of real estate to ten years, necessarily extended the limitation of the debt secured by the mortgage, where it is sought to enforce a sale of the mortgaged premises in satisfaction of said debt, to the same period as the mortgage.
- 2. Mortgage Foreclosure: PLEADING: EVIDENCE.** In an action to foreclose a mortgage of real estate given to secure certain promissory notes, the notes may be set out as the evidence of the debt even if the action is brought but a few days before the expiration of ten years from the time the cause of action accrued. For the purpose of foreclosure the notes continue as evidence of the debt until the mortgage is barred.

APPEAL from Johnson county district court. Tried below before BROADY, J.

B. F. Perkins and *L. W. Colby*, for appellant.

The benefit of the statute of limitations may be waived, and will be, unless pleaded. *Taylor v. Courtney*, 15 Neb., 196. *Atchison & N. R. Co. v. Miller*, 16 Neb., 664. A mortgage foreclosure is not barred after the lapse of five years from the time the cause of action accrued. *Hale v. Christy*, 8 Neb., 264. *Stevenson v. Craig*, 12 Neb. 464. *Cheney v. Cooper*, 14 Neb., 415. *Herdman v. Marshall*, 17 Neb., 259. A maker of a note who has declared to all the world that he has no defense or set-off to make against the note, and the mortgage to secure it, is estopped to set up usury as against a *bona fide* purchaser for value before maturity, who made the purchase relying on such declaration. *Coleb. Col. Secur.*, § 188. *Weyh v. Boylan*, 85 N. Y., 394. *Smyth v. Munroe*, 84 N. Y., 354. *Horn v. Cole*, 51 N. H., 287. *Ashton's Appeal*, 73 Pa. St., 153.

T. Appelget & Son, for appellees.

A mortgage of real estate is a mere chose in action after the notes it secures are barred by limitations, and is open to all defenses in favor of the original mortgagee. *Trustees of Union College v. Wheeler*, 61 N. Y., 88. *Johnson v. Carpenter*, 7 Minn., 176 (Gil. 120). Comp. Stat., Neb., 1885, p. 632, § 31. The purchaser of notes before maturity, secured by mortgage, has no remedy except upon the mortgage, after the notes are outlawed. *Slocum v. Jacobus*, 10 Iowa, 262. *Olds v. Cummings*, 31 Ill., 188. *Terry v. Tuttle*, 24 Mich., 206. *Mott v. Clark*, 9 Pa. St., 399. *Pryor v. Wood*, 81 Pa. St., 142. *Baily v. Smith*, 14 Ohio St., 405. *Sims v. Hammond*, 33 Iowa, 368. *Cumberland Coal Co. v. Parish*, 42 Md., 598. An assignee of a mortgage takes it subject to equities attending its execution, and also to those existing at the time of the assignment. *Crane v. Turner*, 67 N. Y., 437. *Hortsmann v. Gerker*, 49 Pa. St., 283. *Twitchell v. McMurtrie*, 77 Pa. St., 383.

MAXWELL, CH. J.

This action was brought in the district court of Johnson county to foreclose a mortgage on real estate for a debt evidenced by four promissory notes alike in date, amount, parties, and effect, except the time of maturity, being due in two, three, four, and five years after date. The following is a copy of one of said notes :

“\$35.00. TECUMSEH, NEB., December 14th, 1872.

“Two years after date, for value received, I promise to pay to the order of P. D. Cheney, thirty-five dollars, at bank of Russell & Holmes, without interest before maturity, with twelve per cent per annum after maturity.”

“O. D. WOODRUFF.”

The notes are all endorsed by P. D. Cheney. An action to foreclose the mortgage was brought on the 9th day of December, 1884, the summons being issued on that day, and served on the 15th of that month.

The defendant answered the petition, admitting the execution of the notes and mortgage, but alleging that the notes were given for usurious interest, which is admitted, and pleading that the action is barred by the statute of limitations. On the trial of the cause the court below refused to receive the notes in evidence, and found the issues in favor of the defendant and dismissed the action. The plaintiff appeals.

The testimony shows that the plaintiff purchased the notes in question in May, 1874, and that he had no notice of the usurious consideration. He is entitled to maintain the action therefore unless it is barred by the statute of limitations.

In *Hale v. Christy*, 8 Neb., 264, it was held by a majority of the court that an action to foreclose a mortgage upon real estate may be brought at any time within ten years after the cause of action accrued. The writer filed a dissenting opinion in that case, but the rule having been established by a majority of the court, and as it affects property rights, it will be adhered to. If a change is desired, it must be made by the legislature and not by the court. As the action was brought within ten years from the maturity of the first note the action is not barred.

It is claimed, however, that the notes are barred, and are not now evidence of the debt, and that therefore, although the plaintiff purchased the notes before due, that an action on the notes being barred, the equities between the defendant and P. D. Cheney may now be set up, and therefore the defense of usury is available, and a remark in *Cheney v. Cooper*, 14 Neb., 419, that "As the statute would run against the note in five years, it is probable that after the expiration of that time the remedy would be

against the mortgaged premises alone," is quoted to sustain that view. It is stated in that case that the question was not then before the court. It is apparent, however, that the meaning of the language used in that case was, that if an action at law was brought on the note to recover a judgment against the maker, it must be brought in five years. Such an action is not brought to subject the mortgaged property to the satisfaction of the debt, but to subject any property possessed by the debtor liable to sale upon execution. In such an action, therefore, the note is placed in precisely the same condition as though it was not secured by mortgage. Where, however, the action is brought in equity to foreclose a mortgage on real estate given to secure certain promissory notes, such notes continue as evidence of the debt until the mortgage is barred. The debt necessarily must continue to exist until that time, and we know of no reason why the notes should not continue in force as evidence of it.

The former statute limited the time within which an action to foreclose a mortgage could be brought to five years, that being the period when the debt would be barred. In construing the statute of 1869, therefore, we must consider the old law, the mischief and the remedy; that is, the law as it existed when the act of 1869 was passed, what the evil was for which the former statute did not provide, and the remedy the legislature by the act of 1869 has provided to cure the evil, and so to construe the act as to suppress the evil and advance the remedy. 1 Blackstone Com., 87. *Rogers v. Omaha Hotel Co.*, 4 Neb., 58. It is apparent that the object of the legislature in passing the act in question was to extend the period of limitation on mortgages to ten years—that is, that the mortgage may be foreclosed at any time within ten years to enforce the payment of the debt by a sale of the mortgaged property. This necessarily makes the debt the basis of the action of foreclosure, and it may, where there has been no change

in its character, be set out in the petition in the same form in which it was first evidenced. If by promissory notes, then such notes may be set forth in the petition as in an ordinary action of foreclosure. That was the course pursued in this case. The court therefore erred in excluding the notes as evidence and in finding for the defendant.

The decree of the court below is reversed, and a decree will be entered in this court for the amount due in the premises.

DECREE ACCORDINGLY.

THE other judges concur.

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| 20 | 128 |
| 20 | 266 |
| 20 | 128 |
| 28 | 378 |
| 20 | 128 |
| 34 | 515 |
| 35 | 179 |
| 20 | 128 |
| 39 | 667 |
| 20 | 128 |
| 41 | 42 |
| 20 | 128 |
| 43 | 716 |
| 20 | 128 |
| 54 | 14 |
| 20 | 128 |
| 661 | 743 |

GILEAD P. CHENEY, APPELLANT, V. JURGEN JANSSEN
ET AL., APPELLEES.

1. **Usury: BONA FIDE PURCHASER OF NOTES.** Where usury is pleaded as a defense, and the testimony before the court is that the plaintiff purchased the negotiable notes in question before maturity for an adequate valuable consideration, and without notice of the usury, he will take such notes free from the defense of usury.
2. **Mortgage: DECREE OF CANCELLATION: BONA FIDE PURCHASER NOT AFFECTED.** Where an action is brought against a mortgagee to cancel certain promissory notes and a mortgage to secure the same upon real estate, and a decree is obtained against such mortgagee, a *bona fide* purchaser before maturity of such notes without notice, who was the owner of the same when the action was brought and was not made a party to the action, will not be affected by the decree.
3. **Limitation of Actions: MORTGAGEE: EVIDENCE.** An action to foreclose a mortgage may be brought at any time within ten years from the time the cause of action accrues, and in said action the notes continue as evidence of the debt, and may be set out in the petition to foreclose, until the action of foreclosure is barred.

APPEAL from Johnson county district court. Heard below before BROADY, J.

MAXWELL, CH. J.

On March 12th, 1885, the plaintiff filed a petition in the court below, stating his cause of action to be:

That on January 24th, 1876, the defendant Janssen made and delivered to one Mary Whyte his six promissory notes of that date, payable to said Mary Whyte, or order. One note for \$200, due five years after date; one note for \$20, due one year after date; one note for \$20, due two years after date; one note for \$20, due three years after date; one note for \$20, due four years after date; one note for \$20, due five years after date, for value received.

That on the same day defendant Janssen and his wife executed and delivered to said Mary Whyte a mortgage on the north half of the south-west quarter and the north-west quarter of the south-east quarter of section 12, township 6, range 10, in Johnson county, to secure the afore mentioned notes, which mortgage was recorded on February 3rd, 1876, in the recorder's office of said county.

That before any of the said notes became due the same were endorsed by said Whyte to the plaintiff, who ever since has been and still is the owner and holder thereof.

That said indebtedness is due and unpaid.

The plaintiff prays that said mortgage may be foreclosed, the land sold, and proceeds applied to the payment of said indebtedness, costs, and attorney's fees.

The summons is dated March 12th, 1885, and was served March 18th, 1885.

On March 30th, 1885, the defendants filed an answer, wherein they admit that said Janssen made and delivered to Mary Whyte the notes set out in plaintiff's petition, and to secure the same made the mortgage mentioned. They deny that said notes or mortgage, or any of them, were

ever transferred to the plaintiff before maturity, or that he is the *bona fide* owner thereof, and they deny every other allegation in the petition.

Usury in the original transaction is alleged, and it is alleged that no assignment of the mortgage sued on from Whyte to plaintiff was ever made and recorded. It is also alleged "that on August 22nd, 1879, defendant Janssen commenced suit to cancel and discharge from record two mortgages against Mary Whyte and P. D. Cheney, alleging the usurious nature thereof, and brought into court \$200, in full, praying that said mortgage sued on be satisfied of record. Said Whyte and Cheney entered their appearance, and on April 9th, 1880, the court found generally against said Whyte, that there was due her \$200. The same was then brought into court and there yet remains, and by that decree the mortgage mentioned in plaintiff's petition was cancelled and satisfied of record. Said decree remains in full force. Wherefore defendant prays that plaintiff be allowed to recover no more than \$200 without interest. That by reason of said decree all questions are *res adjudicata*."

On May 1st, 1885, plaintiff filed a reply, denying that Mary Whyte entered her appearance in the suit of Janssen against Mary Whyte and P. D. Cheney, and denies that the questions are *res adjudicata*. In November, 1885, a trial was had, and a decree rendered in favor of the plaintiff for the sum of \$237.60.

The following deposition contains all the testimony in relation to the transfer of the notes and mortgage:

Deposition of Gilead P. Cheney, taken June 6th, 1885: I am the plaintiff; reside in Denver, Colorado; am the owner of the notes and mortgage sued on; purchased them all from P. D. Cheney, June 24th, 1876; paid \$208 therefor then; took papers and have owned them ever since; was abstract of title with same, showing title of land to be good in Janssen; was also with papers a declaration of no

set off, signed by J. Janssen, stating that he had no defense to make against the notes; I was convinced by same that Janssen had no defense to make against the debt; I asked P. D. Cheney what the notes and mortgage were given for; he informed me that they were given for money loaned at ten per cent interest; I had been in Johnson county in the neighborhood of land; land is about ten miles from Tecumseh, the county seat; was satisfied the security was ample; had no knowledge of usury in the transaction; knew nothing further than what I have stated; would not have purchased the notes if I had any notice or knowledge of usury or other illegality in the transaction; was well acquainted with Mary Whyte, and when I bought papers I understood they belonged to her; was familiar with her signature; had seen her write often; knew endorsements on notes to be genuine; since I commenced this suit have been informed by my attorney, B. F. Perkins, that in 1879 Janssen had a suit against Mary Whyte to cancel this mortgage; I never heard of such suit, directiy or indirectly, until spring of 1885, when I heard it of Mr. Perkins; if there was such a suit I had no notice of it nor anything to do with it; have kept the notes and mortgage as long as I could do so for the benefit of the twelve per cent interest, the debt being well secured.

There was no cross-examination. But this testimony was sufficient *prima facie* to show him to be a *bona fide* purchaser of the notes in question before maturity, and there being no testimony to the contrary, the court should not have found otherwise.

2. The proceedings to cancel the mortgage in question, which were instituted in 1879 against Mary Whyte and P. D. Cheney, could not affect the plaintiff, if prior to their maturity he had purchased the notes in question for a sufficient consideration, and they had been indorsed and delivered to him. It is unnecessary to determine in what cases the security will follow the debt, as the plaintiff testifies

that he is the owner of the notes and mortgage, and that he took the papers and has owned them ever since the 24th day of June, 1876. As the testimony shows that the plaintiff was not a party to the action in 1879, the decree in that case as to him is a nullity.

3. That the action is barred upon the notes after the expiration of five years. This question was before this court in *Cheney v. Woodruff*, ante p. 124, and after careful consideration it was held, in an action to foreclose the mortgage, the notes continued in force as evidence of the debt until the action of foreclosure was barred. That decision in our view is correct, and is adhered to. The legislature having extended the time in which to bring the action to ten years, it is but reasonable to suppose that all the incidents necessary to give full effect to the decree when rendered should continue in force. The court therefore erred in holding otherwise. The decree of the court below is reversed and a decree will be entered in this court for the amount due.

DECREE ACCORDINGLY.

THE other judges concur.

A. RICHARDSON, APPELLANT, V. O. D. WOODRUFF ET
AL., APPELLEES.

Mortgage: NON-NEGOTIABLE BONDS: PARTIES. Where a non-negotiable bond, secured by mortgage, to which certain coupons payable to bearer for interest were attached, was endorsed and transferred for value before due, and without notice to the holder, who brought an action of foreclosure on said instruments, *Held*, That the holder took subject to the defenses between the original parties.

APPEAL from Johnson county district court. Heard below before BROADY, J.

L. C. Chapman, for appellant.

To establish usury in a loan made by an agent it must appear that the agent charged more than the legal rate, and that the principal authorized such unlawful charge, or in some way knowingly got some benefit from it. *Call v. Palmer*, 6 Sup. Ct. Rep., 301, affirming *Palmer v. Call*, 7 Fed. Rep., 737. *Bingham v. Myers*, 1 N. W. Rep., 613. *Jordan v. Humphrey*, 18 N. W. Rep., 450. *Ballinger v. Bourland*, 87 Ill., 513. *Boylston v. Bain*, 90 Ill., 285. *Kihlholz v. Wolf*, 103 Ill., 366. *Hoyt v. Pawtucket Sav. Inst.*, 110 Ill., 390. *Acheson v. Chase*, 9 N. W. Rep., 734.

T. Appelget & Son, for appellees.

The bond is not commercial paper, and the title of the holder is subject to any equities that might exist between the original parties. Comp. St., Neb., 1885, p. 388, § 1. Edwards' Prom. Notes, 165. *Fernon v. Farmer*, 1 Har. (Del.), 32. A mortgage given to secure non negotiable paper has no commercial character, and there can be no innocent holder to the exclusion of equities. *Crane v. Turner*, 67 N. Y., 437. *Horstman v. Gerker*, 49 Pa. St., 283. *Twitchell v. McMurtrie*, 77 Pa. St., 383.

MAXWELL, CH. J.

On the 29th day of November, 1884, the plaintiff filed a petition in the court below stating his cause of action to be :

That on December 14th, 1872, O. D. Woodruff, defendant, executed and delivered, for a valuable consideration, unto one Byron Murray, Jr., one bond for \$500, due five years after its date, payable to said Murray, with five

interest coupons of \$50 each annexed thereto for the yearly interest, payable to the bearer, the bonds and coupons to draw twelve per cent interest after due. Also on same date, December 14th, 1872, said defendant O. D. Woodruff and wife executed unto said Murray a mortgage on S. E. $\frac{1}{4}$ 28-4-10, to secure said bond and interest coupons, the mortgage being duly recorded on December 17th, 1872, in book B of Mortgages, on page 74, in said Johnson county.

That \$1,320.50 is due on said bond and notes.

That by a stipulation contained in the mortgage it was agreed that in case of foreclosure an attorney's fee of five per cent on the amount found due should be allowed and paid by defendants.

That the plaintiff Richardson is the legal owner and holder of said bond and coupons and the mortgage securing the same, except the first interest coupon of \$50, due December 14th, 1873, which has been paid.

That the plaintiff Richardson became the owner and holder of the bond and four last coupons by purchase from said Murray before the maturity thereof or of any one of said four coupons.

That default has been made in the payment of said bond and coupons. Plaintiff prays an account, and a degree of foreclosure, and sale. Copies of bond, coupons, and mortgage are attached to the petition.

The mortgage recites that it is given to secure one bond for \$500, payable to Byron Murray, Jr., with five coupon interest notes attached for fifty dollars each, payable to the bearer, for the annual interest on said bond.

In the amended answer the defendants say:

First. "They admit that O. D. Woodruff and E. H. Woodruff, his wife, executed the mortgage deed as made exhibit in said petition."

Second. They say that "O. D. Woodruff, one of the defendants, being in want of money, did, on or before

December 14th, 1872, make application to one B. F. Perkins, who represented himself as being the agent of parties in the East who had money to loan, of \$500, for five years, and was informed by said Perkins that he could obtain said loan for him, the said O. D. Woodruff, but that the said Woodruff would be compelled to pay therefor the yearly interest of seventeen per cent per annum, together with a fee of \$25, and all expenses of making and recording papers connected with said loan."

Third. "Whereupon this defendant O. D. Woodruff did then and there corruptly and usuriously contract and agree to and with said B. F. Perkins as the agent aforesaid, for the said loan of \$500, at an annual rate of interest of seventeen per cent per annum."

Defendants, further answering, say that the bond, coupons, and mortgage mentioned in plaintiff's petition, and five other notes for \$35 each, payable to P. D. Cheney, "were all given as the result of the above corrupt and usurious conduct," and for no other purpose.

"That defendants, in pursuance of the contract above set forth, have paid to P. D. Cheney the sum of \$85, through the bank of Russell & Holmes, and to B. F. Perkins, as agent of the loaner, the sum of \$25, being a part of the aforesaid corrupt and usurious contract."

Fourth. That the loan was not obtained from B. Murray, Jr., but was had and obtained from P. D. Cheney, through B. F. Perkins as agent; and that the bond, coupons, notes, and mortgage given therefor were executed to different parties, to enable the said Cheney to defeat the ends of justice and avoid the usury laws of Nebraska.

Fifth. Denies that plaintiff is a *bona fide* holder and owner of the bond, coupons, and mortgage sued upon.

Sixth. That more than ten years have elapsed since the conditions in said mortgage were broken, and the action is barred by the statute of limitations.

Seventh. That more than five years have elapsed since

the bond and coupons fell due, and action thereon is barred.

The plaintiff in the reply denied all the new matter stated in the answer.

The bond recites: "Know all men by these presents, that I, the subscriber, am justly indebted to Byron Murray, Jr., for value received, in the sum of five hundred dollars, payable five years after date * * * with twelve per cent after maturity. Dec. 14, 1872.

"O. D. WOODRUFF."

This was endorsed "B. Murray, Jr."

The four coupons attached to the bond are in the same form, except the time of maturity. The following is a copy of one of said coupons:

"\$50. TECUMSEH, NEB., Dec. 14, 1872.

"Two years after date, for value received, I promise to pay to the bearer Fifty Dollars at the office of P. D. Cheney, in Jerseyville, Illinois, with twelve per cent per annum after maturity.

"O. D. WOODRUFF."

The testimony tends to show usury in the original transaction; and that the plaintiff purchased the bond in question with the coupons attached in 1873. It will be observed that the bond is non-negotiable, and the only question for determination is, does the transfer of such bond by indorsement before due, for a valuable consideration to a *bona fide* purchaser without notice, pass such bond and coupons to the purchaser, free from equities between the original parties?

The bond in this case is payable to Byron Murray, Jr., personally, and not to bearer or order. It is not therefore commercial paper, and the holder takes it subject to all defenses between the original parties. 2 Daniel on Neg. Inst. 432. *Atchison v. Butcher*, 3 Kas., 104. A coupon bond consists of an obligation to pay a certain amount of

money at a future day, and annexed to it is a series of coupons, each of which is a promise for the payment of a periodical installment of interest. The contract between the payor and the holder is contained in the bond, but the coupons are furnished as convenient instruments to enable the holder to collect interest without presenting the bond, by separating and presenting the proper coupon which represents it, to another person at any time before its maturity. 2 Daniel on Neg. Inst., 426. Coupons are the primary engagements of their payor, and if payable at a bank, they are simply like notes so payable, but are not entitled to days of grace. Id. Whether the coupon be in the form of a note, bill, or check, or be a mere ticket or warrant of the amount and place of payment, the holder may sue on it without producing the bond; but he receives the sum due and payable according to the terms of the bond. It will be seen that the bond is the contract which governs the terms of the coupon; in other words, the coupon is an incident growing out of the main contract or bond, and dependent upon it for its validity. If the main contract was non-negotiable when assigned, the coupons then attached to said contract or bond were so also for the purpose of admitting the equities between the original parties. They were all upon the same sheet—in fact parts of the same contract—and the purchaser could not claim that he was deceived. This question was before the supreme court of Kansas, in *Atchison v. Butcher*, 3 Kas, 104, under a state of facts very similar to the case at bar, and the court held that the bonds and coupons were open to defenses between the original parties.

At common law, a bond being a sealed instrument, the consideration was presumed and could not be inquired into. But our statute (Comp. Stat., Chap. 81) has abolished private seals, and thus leaves the consideration of all contracts subject to inquiry, and the assignee of a non-negotiable instrument is in no better condition than the assignor. It is

very clear that the plaintiff took the bond and coupons in question subject to the defenses of the maker, and therefore subject to the defense of usury. The judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JAMES CASEY, PLAINTIFF IN ERROR, V. THE STATE OF
NEBRASKA, DEFENDANT IN ERROR.

1. **Homicide: CIRCUMSTANTIAL EVIDENCE.** Where it is sought to establish homicide by circumstantial evidence, the circumstances when taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no one else, committed the offense charged.
2. ———: ———: **FAILURE OF PROOF.** It is not sufficient that the facts create a probability, though a strong one. If, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails.
3. ———: ———. It is essential that the circumstances, taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis. *Com. v. Webster*, 5 Cash., 319.
4. ———: ———: **CUMULATIVE EVIDENCE.** Evidence of distinct and independent facts of a different character, though it may tend to establish the same ground of defense, is not cumulative within the rule. *Walker v. Graves*, 20 Conn., 305. *Barber v. French*, 18 Vt., 460.
5. **Indictment: SEPARATE COUNTS: VERDICT.** Where distinct offenses are charged in separate counts of an indictment, the jury must either return a general verdict of not guilty or respond to each charge in their finding. *Wilson v. State*, 20 Ohio, 26. *Williams v. State*, 6 Neb., 343.

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| 38 | 337 |
| 20 | 138 |
| 51 | 686 |
| 20 | 138 |
| 61 | 236 |
| 61 | 806 |

ERROR to the district court for Gage county. Tried below before BROADY, J.

W. H. Ashby and Pemberton & Bush, for plaintiff in error.

1. When distinct offenses are charged in separate counts of an indictment, the jury must either return a general verdict, or else respond to each charge in their finding; especially where the offenses charged are made separate and distinct by statute, and subject to different degrees of punishment. *Hurley v. State*, 6 Ohio, 404. *Wilson v. State*, 20 Ohio, 26. *Buck v. State*, 1 Ohio St., 61. *Rifle-maker v. State*, 25 Ohio St., 395. *State v. Behimer*, 20 Ohio St., 572. *State v. Sutton*, 4 Gill, 494. *State v. Commissioners, etc.*, 3 Hill (S. C.), 239. *Marshall v. Com.*, 5 Grat., 663. *State v. Redman*, 17 Iowa, 329. *State v. Arthur*, 21 Iowa, 322. *Ray v. State*, 1 G. Greene, 316. *Webber v. State*, 10 Mo., 4. *Grah. & W. New Trials*, §§ 140, 1390. *Williams v. State*, 6 Neb., 334.

2. Shooting with intent to kill can only be predicated on a shooting, the intent of which failed. *Foster v. People*, 50 N. Y., 598. *People v. Rector*, 19 Wehd., 608. *State v. Hammond*, 35 Wis., 315, 320. *Pliemling v. State*, 46 Wis., 522, 523. *Smith v. State*, 2 Ohio St., 513.

3. Declarations or acts succeeding closely upon the transaction, and growing directly out of it, are admissible as part of the *res gestæ*. *Whart. Crim. Ev.*, § 262. 1 *Greenl. Ev.*, § 108. *State v. Tweedy*, 11 Iowa, 350. *State v. Montgomery*, 8 Kan., 351. *Allen v. Duncan*, 11 Pick., 309, 310. *Mitchum v. State*, 11 Ga., 615. *Handy v. Johnson*, 5 Md., 450.

William Leese, for the state.

Where an indictment contains two or more counts, and the defendant is found guilty on one count, and the ver-

dict contains no finding as to the other counts, this silence of the verdict is equivalent to an express acquittal of the charge in the other two counts. *Beaty v. State*, 82 Ind., 228. *State v. Hays*, 78 Mo., 600. *Stuart's Case*, 28 Grat., 950. *State v. Whitton*, 68 Mo., 91.

MAXWELL, CH. J.

The grand jury of Gage county found an indictment against the plaintiff, in the first count of which he is charged with manslaughter; in the second, with stabbing one W. H. McElhaney with intent to kill and murder, and in the third, with stabbing said McElhaney with intent to wound. On the trial of the cause a verdict was returned as follows: "We, the jury in this case, being duly impaneled and sworn, do find and say that the defendant is guilty as charged in the third count of the indictment." The plaintiff was thereupon sentenced to imprisonment in the penitentiary for thirteen years.

A large number of errors are assigned, among which it is alleged that the verdict is not sustained by the evidence; that there is newly discovered evidence, and that the verdict does not pass upon the first and second counts of the indictment, etc. Those deemed important will be considered in their order.

1. That the verdict is not sustained by the evidence. The testimony as set forth in the abstract is as follows:

Dr. Charles Gafford testified, and described the wounds, and in answer to the 7th int. says that the wound in the breast is the only one that was fatal. The breast was full of blood, and in turning the body over the blood gushed out of that wound. There was some blood on the clothing.

This wound, as all the rest, ranged from the right side towards the left. The blows making the wounds were all directed from right to left.

Dr. Given testified to the same effect, adding that McElhaney's clothes were saturated with blood.

A. D. McCandless testified:—On the night of Nov. 15th, 1884, saw McElhaney and the defendant, Casey, at the opera house saloon in Wymore, Gage county, Nebraska. McElhaney and defendant were standing at the bar. I heard Mc. tell Casey they had buried the hatchet the third time, and he wanted him to leave it buried. They took a drink together. Ten or fifteen minutes after this Casey went up to Mc. and began to talk about trouble they had had prior; had some words and then went up and took a drink. Mc. told Casey the hatchet was buried, and if he brought it up again he would paralyze him. They came together again; Mc. took hold of Casey and pushed him back. About this time the saloon keeper told Casey he must go out, which he did. *McElhaney followed Casey out.* They got hold of one another almost as soon as they got out. Mc. got Casey by the breast, and threatened to paralyze him. The night-watchman came up. Mc. took hold of him with one hand and Casey with the other and bumped them together. I asked the watchman to let Mc. alone and not attempt to make any arrest. He let go and stepped back, and Mc. threw Casey down. This was south of the saloon door. Mr. Linton was there, and we both insisted on Mc. letting Casey up. He got up, lifted Casey to his feet and let go of him. They were apart not over a minute until Casey walked up to him again. Mc. again threw him down; this was north of the saloon door, and over a grating in the sidewalk. One of Casey's legs went through the grating. Linton and I told Mc. that Casey's leg was in a hole and liable to be broken. We tried to get Casey's leg out. Mc. raised up as though he was getting up. He had his hand on Casey's breast. He had been sitting on him, but got up partly, then dropped back and struck Casey in the nose; then changed hands and struck him again. Casey was lying on his

back. When Mc. was striking Casey, John Bagley came up and said it was a damned shame to see an old man pounded up that way. Mc. rose off from Casey and says "What is that," and made a spring for Bagley. Mc. and Bagley both went around the corner of the saloon. The next I saw of Mc. he came from the north side of the building; was out about ten feet from the building; he walked up very slowly to a point about north-east of the building, and was standing there when Casey came from the south, past me, and walked up to him, throwing his arm around his neck and got him by the collar and commenced striking. Mc. backed off, and as he backed off he doubled up. Mc. said, "He is cutting me to pieces with a knife."

CROSS-EXAMINATION.

Casey never offered to strike Mc. He wanted to talk. I told Bryant he had better not try to arrest Mc. I thought he would not let him. When Mc. was on Casey he sat straddle of him on his knees. When Mc. and Casey met the last time, Casey struck underhanded blows. When Mc. had Casey down he told him that he could paralyze him. Casey said he knew he could.

W. A. Linton testified: After Mc. and Casey got out of the saloon Mc. got him down twice. Mc. jumped off of Casey and started around the corner after Bagley. They got into a scuffle around there. I went around. It was dark. Some one said, "Come, old man, I have got him. I have him down; come and give it to him." The policeman separated them. The scuffle around the corner lasted from one to three minutes.

CROSS-EXAMINATION.

Afterwards I found blood on the sidewalk around the corner where the scuffle was. I think there was three in the fight around the corner, and I found the pool of blood

right where the scuffle took place. I don't think Casey was in the row. When they met after the row around the corner, Mc. did not do much of anything. He did not seem to be Mc. He was a good man, and if he was himself he would not stand and let somebody strike him. When he had Casey down he struck him several times before he went around the corner. He handled both Bryant and Casey easily.

H. A. Bryant testified: Live at Wymore, Gage county; was there on the night of November 15, 1884, and saw affray between Mc. and Casey. Casey says, "Don't want any trouble with you." Mc. says, "Shut up, then, God damn you, or I will paralyze you." Casey says, "I am an old man, and don't want to fight with you." Mc. says, "Well, shut up, then, God damn you, or I will paralyze you." He says, "Well, Mc., let's quit; let's go in and have a drink." Mc. took both hands and pushed Casey against the window. Casey says, "Mc. I don't want to fight you, you are a better man than I am." He says, "Shut up, then, God damn you, or I will paralyze you." He says, "You are a better man than I am." At that he fetched him a swing, and as Casey came around, he stepped on that grating lengthwise, and it broke and let him in. Mc. struck him in his forehead, and Casey had his left hand to ward off the blow, with his right hand by his side; Mc. had Casey with his left hand in his breast or coat, and Casey straightened his arm by his side; Mc. said, "Oh no, you don't come that, old man;" he let go quickly with his left hand and took hold of Casey's hand and fetched it up across his stomach; then he struck him two, three, or four times in the nose—fearful blows—he had the leverage of his arm; and at the same time a voice came from the right, saying it was a damned shame. Mc. jumped up, left Casey, and started for the man on the north. The first that transpired there I did not see. The next I saw was around the corner. Some one said, "Take

him off;" Mc. said, "No, let him alone, I will take care of him." Foley came along and says, "Quit this rumpus." The crowd scattered; Mc. got on his feet a few feet from me, while Casey was standing within three feet of me on the north. Mc. came directly toward Casey, and as they came up within a few feet of each other, Mc. first straightened up and raised as he run toward Casey, and Casey struck with his right hand. The first blow he struck, Mc. says, "Take him off boys, he is cutting me to pieces." They both fell off the sidewalk, one went one way, and the other the other. Casey, I think, struck him four or five times, and the last time higher than at any other time. As he struck the first blow, Mc. dropped lower. He struck Mc. first, I think, in the groin or abdomen. The others were higher up. The last blow, I think, struck him in the breast, and they both fell off the sidewalk together. Mc. came up in a stooping position, and each time Casey struck him, he dropped lower and back some three steps.

CROSS-EXAMINATION.

I stepped around the corner in the dark, and there the fight was going on. There were three men that were loud and boisterous. Foley stopped the fuss there. Mc. had made two or three struggles to get up. Bagley was the man he was fighting with. Bagley was on top of him; Bagley's head was in different positions; Bagley was not a very large man. He was a little fellow, weight about 120 or 125 pounds. The most of the time Bagley was on top of Mc., holding Mc. down. Mc. was a strong muscular man; he was more than ordinarily so. He was accustomed to fighting and a hard man to handle. Bagley remained on top until Foley came and broke it up. Mc. was making efforts to get up, but he didn't do it until Foley scared this fellow away. The first I saw of Mc. he was lying on his back, his head near the corner of the building, and Bagley on him, and that was soon after Mc. left Casey.

Soon as I got Casey out of the grate, I went around to see where the difficulty was. I only had to go a few feet—likely six or seven. It didn't take me long.

B. G. Davis testified: I reside at Wymore; am acquainted with the defendant, James Casey. It was on Saturday night, two weeks before this thing occurred, I saw Casey a little under the influence of liquor, and I asked him not to take any more, and he replied that he would just as soon get full as not; that he had it in for Mc.

CROSS-EXAMINATION.

Mc. had been choking Casey before that.

Wm. Hackley testified: Reside in Wymore; was there on the night of November 15th, 1884. I examined the grating and ground under it by the saloon, and found blood in two places. There was a pool of blood under the grating, and around the corner was another pool of blood. It seemed from what I could see around here, blood showed on the walk, and it scattered around; this here had dropped down on the earth and formed a pool. Right under the grating next to the wall, was the pool of blood; around this corner was another pool of blood on the sidewalk.

CROSS-EXAMINATION.

Blood had run through the grating.

J. N. Ray testified: (Defendant objected to this witness, as his name was not on the indictment. Objection overruled). I found a knife about five days after this affair—thirty feet from the corner of the opera house. I have the knife.

John Bagley testified: I was in Wymore the 15th of November, 1884. I know of Mc. being cut there that night. I didn't do the stabbing or see any one do it. I never saw Mc. or Casey before in my life that I know of. When I said it was a shame to see an old man beaten like that, Mc. sprung for me, and I ran around the corner and

I bumped against some one, and he caught me. He had me by the coat and I was trying to get away from him. He was larger than me and could do what he wanted with me, and I thought my chance was to trip him. I turned quick, caught him by the waist and tripped him, and he fell on his back. Soon as he was down he was up again. Soon as I knocked him down, I tried to get away from him.

His head was between my legs; I got one leg loose and was kicking to get loose, and some one gave him a kick, and the officers came and he let me loose and I went away outside the crowd. When I had him down there was some one around him. When he was there some one kicked him.

CROSS-EXAMINATION.

When the officer came I went west. I stood there a while; can't say just how far I did go; I can't say where Fitzgerald was standing. I don't know where Casey was. I don't know who kicked him; I was standing over him. I am nineteen, going on twenty. I live at Shenandoah, Penn. I came to Nebraska last May. I did not strike Mc. at all; I just threw him down. He struck at me; just as quick as I saw him fall I turned to go away. Foley came from the west, I believe. I went to the west.

State rests.

John Gallagher testified: Reside at Wymore, Gage county. Was living there on the 15th of November last. I saw the difficulty that ended in the death of Mc. Casey and Mc. had a few words, and they took hold of each other and scuffled. Mc. told him he could paralyze him. Casey told him he knew it; he asked why he did not go away and let him alone. They kept talking to each other. Bagley made some remark, and Mc. let go of Casey and made one step back to the corner, and there was Bagley. As Mc. stepped forward some one struck him. I could not see who it was. Mc. groaned at the time. Casey was helped up and I think he went toward Mc. Mc. came

around from the corner and appeared weak. Bagley stepped around and said he had done him up, now come on, it was his time. Casey went that way. Casey's nose was bleeding. His nose looked the next morning as if it had been pinched. When Mc. started for Casey I can't say how far he did go before some one struck him. I seen the man, or something, and then I heard a groan. At this time Mc's. back was in the light, but his face was in the dark just at the corner. I was subpoenaed here last term in the case of the State vs. John Bagley, to testify on behalf of the state.

RE-DIRECT EXAMINATION.

Q. State whether or not you have been employed by the prosecution in this case to hunt up testimony?

Objected to as immaterial, irrelevant, and incompetent; and furthermore to Mr. Ashby making statements to the jury unless he is put under oath. Sustained.

John McMullen testified: Live in Wymore; was living there on the 15th of November, 1884. Was present at a difficulty which ended in the death of Mc. He said, "Casey, I want you to go home, or I will paralyze you." Casey says, "Mc., I don't want to go home just now, and I know you are a better man than I am; you can paralyze me if you want to; but there is nothing between us to make rows in that way." Mc. took hold of Casey and shook him a little and laid him down on the sidewalk, and then let him up; took hold of him again, and about that time Bryant came around and asked Mc. to let go of him and he would try and get Casey to go home. Mc. gave both of them a shaking, rubbing Casey's nose with his fist. Casey didn't seem to be angry, he didn't seem to think Mc. was going to hurt him. Mc. hit him twice or three times in the face. Just then some little fellow standing in front of the window on the stone said it was a damned shame a crowd of men would stand around and see an old man abused in that way. At that Mc. sprang off Casey

and made for the little fellow. The little fellow jumped around the corner and that is the last I saw of him until I saw Foley, the policeman. He told them they would have to quit or he would arrest them. Meantime Casey got up and I think went south. When Mc. went around the corner I heard no noise. I heard somebody say, "Give it to him, Johnnie, we won't see any son of a bitch hurt you, while we are around."

CROSS-EXAMINATION.

I saw Mc. after he came out of the difficulty with Bagley. I saw him come out of the darkness and Casey run up toward Mc. and I think took hold of him with his left hand and made three or four underhand strokes with his right hand. Mc. was bent over. I don't think Mc. said anything.

RE-DIRECT EXAMINATION.

I heard Mc. say nothing while they were around the corner. My memory is not fresh whether I heard him say anything or not.

Q. Did you hear the sound of a voice you thought was Mc's. say, "Boys, take him off, I have got enough?"

Objected to as leading. Sustained.

I heard nothing more than some one say, "Give it to him, Johnnie." I can't remember to-day whether I heard any one say "Boys, take him off, I have got enough," or not. I have forgotten a good many things since then.

Thomas O'Harra testified: Live in Barneston, Gage county. Was in Wymore the 15th of last November. Was present at the difficulty that ended in the death of Mc. I saw him strike Casey several times with his fist and blood came from his nose. Some men were trying to get his leg out of the railing. I made the remark to Bryant and Linton that it was a shame, they ought to part them. They said Casey was drunk. I said I was aware of that and so was Mc. Then Mc. turned around and said, "God

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damn you, do you want me to paralyze you?" Then some one on the north made the same remark and he made for that party. I heard a racket around the corner. I could not say what condition Casey's face was in exactly, it was covered with blood; he was bewildered, and I told him he ought to go home; he says, "Yes, I want to go home." I took him by the coat collar and told him to come to the barn and wash the blood off. He went a few steps, crying; he said he was killed, or hurt, and dropped down and could go no further. The city marshal hallowed to me and asked if I knew where Casey was. Casey was lying on the ground. He said, "Get a team and take him home." I got my team and took Casey home. His face was badly bruised up and was bleeding. I cannot say how much blood there was at the grating. While Mc. had Casey down he made no effort to fight. I heard him say, 'Bill, don't strike me, you are a better man than I am,' to Mc.

CROSS-EXAMINATION.

Can't tell what time of night it was. I saw Casey in the saloon. I saw the beginning of it in the saloon. There was a one-armed man struck Casey in the face—didn't make any mark—didn't make it bleed any. Mc. said, "God damned son of a democrat." The bar-tender shoved Casey away. Casey didn't strike back. Casey said on the sidewalk, "Bill, don't strike me." I remember that distinctly, that is all I remember. I heard Mc. say something about burying the hatchet. I remember Casey said, "Bill, don't strike me, you are a better man than I am." At this time I was standing by McCandless. Casey was trying to ward off Mc's fist. After they came outside Mc. had hold of him, by the window. Casey didn't do anything to get away. Think I heard Mc. tell him to go home and let him alone, but had hold of him at the same time. Could not see as Casey had any chance to get away. Mc. was chucking him against the window. I didn't try

to help him up. There was a crowd around. I saw what was done. Casey was trying to get his leg out. He was warding off the blows with his right hand. The other I could not see. Mc. struck him four or five blows in the face, and the blood came. Struck him pretty hard. Casey didn't try to do anything that I could see. Don't think Mc. had any cause for striking him. Didn't see Casey do or make any effort to do anything to Mc. I took Casey home that night.

RE-DIRECT EXAMINATION.

There was a great crowd there surging back and forth. When Mc. sprang off Casey I retreated back and the crowd pushed off the sidewalk on the east side.

Wm. Gillispie testified: Live in Wymore, and lived there the 15th of November, 1884. I saw Casey on that night. I found him between the livery stable and the saloon, south-east of the saloon. He was lying in the street; his face was bloody and dirty—his nose was bloody. I saw him the next day; his nose and lips were bruised; his nose was swollen. The hide was broken on the bridge of his nose.

CROSS-EXAMINATION.

I didn't notice his hands—didn't notice his clothes. This was after the fuss.

Joseph Foley testified: Live in Wymore. Was there on the night of the 14th of last November. Was special police there. I came along the north side of the building from the west. Mc. was down and there was a man, John Bagley, partly bent over him and they separated in a minute after I got there. Don't know exactly the position Mc. was in. The young man was backing away; he was leaning west. Several others were there. When Bagley left Mc., Mc. raised up and he looked to me to be hurt; he raised up slow. I noticed something peculiar in his conduct. The peculiarity was that he didn't make

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any efforts to fight, and disappeared. Mc.'s head was in that space between the corner of the saloon and the railing. Had some talk with the young man afterward as to what he was doing.

Q. What did he say then?

Objected to as immaterial, irrelevant, incompetent, and no ground laid for impeachment, and as hearsay. Objection sustained. Defendant excepts.

The marshal and I arrested Bagley that night.

Q. What did you arrest him for?

Objected to as immaterial, irrelevant, and incompetent. Objection sustained. Defendant excepts.

Defendant's counsel offered to prove by this witness that at the time he arrested John Bagley he said, "Yes, I done the son of a bitch up, and I can do it again."

Objected to as immaterial, irrelevant, and incompetent. Objection sustained. Defendant excepts.

Mrs. Winnefred Casey testified: I am the wife of James Casey. When Casey was brought home his nose and face was bruised and had been bleeding. He appeared to be helpless.

James Casey testified: I am the defendant in this cause. I resided in Wymore last November. I didn't have any knife on the 15th of November last. I did not cut Mc.

CROSS-EXAMINATION.

I first saw Mc. in the saloon. We drank a glass of beer, and Mc. said something about a hatchet and seemed angry. I was not angry—not at all. I had been drinking some, but remembered what was going on. Have not a distinct recollection of what was going on.

Q. Is it not a fact that you had been drinking and did not know what you were doing?

Objected to as not proper examination. Objection overruled. Defendant excepts.

I remember meeting Mc. when I went into the saloon.

I did not know what I was doing. I was drinking some—yes, I was drunk. I can remember things pretty well sometimes when I am drunk. Think I remember at this time until I got out doors. I remember what occurred outside the door. Remember I did not get angry at all; did not strike Mc. that night; don't think I took hold of him. Didn't have a knife that day nor the day before. Didn't carry a jack-knife of any kind. Sometimes I use tobacco and use a knife sometimes to cut it. Sometimes I carry a knife. I have no knife now and didn't have at that time—never had one like that—never saw one like that—am positive about that. Remember I got my leg in the grate—don't remember who took it out. I don't remember what I did when it was taken out. I know I did not cut Mc. No one gave me a knife. I don't remember what occurred. Don't remember of Mc.'s hollowing "They are cutting me with a knife;" don't remember of being on the corner. Don't remember of falling down on the street. Don't remember of walking quickly by the postoffice. Don't remember anything about that after I got out of the grate. Know I never cut him; never thought of it—didn't have any grudge against him. I did have difficulty with him once. It is a fact he shook and knocked me down. I never made the statement I "had it in for him," I know. I forget whether I said I was hurt out on the street or not, don't remember anything of that kind now. I remember Bryant's testimony, remember of his testifying that I run my hand down by my side and of Mc.'s telling me "No, you don't come that." Don't think I run my hand down by my side. I did not strike him nor strike at him at all—did not have hold of him nor did not strike any underhand licks on the corner—don't remember of having hold of him on the corner; don't think I went out to the corner.

Wm. Hackley testified: Was acquainted with McElhaney, the deceased. His physical strength was more than

an ordinary man; was a man of a great deal of courage to carry out his point—determined—in regard to his fighting qualities, when he was not in liquor he did not seem to be quarrelsome; but he was a little inclined when drinking to pick up anything quick, and take up anything that came for him.

Defendant rests. Case closed.

The following testimony was taken at the coroner's inquest and introduced as testimony on the trial.

John Thissen's testimony: I had some conversation with Mc. after he was hurt, both at Greenwood's lumber yard and at Givens' office. He said he wanted to see the little fellow revenged and told me to see Deyo and see what could be done; he said he expected to die soon. He said the little fellow cut him in the chest when he was on Casey, and he turned around and he got cut again, and that weakened him. He was in his right mind. He said he was right over the banister in front of the saloon on Casey when he received the cut in the chest. He said it was the little fellow who stabbed him in the breast; he didn't mention his name.

Theodore Angerstien testified: Bagley said it was a damn shame that so many would stand around and see an old man hurt so. McElhaney then got off Casey and started after him, and the little fellow ran around north of the opera house, and McElhaney after him, and just as Mc. went around the corner this little fellow, I think, am not sure, struck Mc., and Mc. hollowed "Oh, oh," and fell. Fitzgerald said to him, "Give it to him, Johnnie; give it to him." Either the little fellow or Fitzgerald said to Casey, "You man that got licked, come on and give it to him; we have got him down." Mc. said, "Take him off, I have got enough;" and at that time, or soon after, the policeman separated them, and Mc. clinched again near the N. E. corner of the opera building, and Casey struck Mc. several underhand licks, and Mc. said to McCandless,

"Mac., they are using a knife on me," and Mc. was drawing himself up and backing away from him (Casey).

The above is all the testimony in the case.

It will be seen that McElhaney was the aggressor throughout, if we except that portion of the testimony relating to Casey striking him, which will be noticed hereafter. McElhaney's abuse of Casey, so far as appears, was entirely unjustifiable, and the blows inflicted by him on Casey's face, while he held him down on the grating, very severe. No one present seems to have had the courage to attempt to interfere; but when a mere boy in years and stature protested against such abuse, McElhaney sprang for him, and overtook him when he was turning the corner of the building. From a plat exhibited on the argument it seems that the saloon in question stands on the southeast corner of a block, and that the front of the building is to the south; that the sidewalk extends across the front and along the east side of said building; that McElhaney was holding Casey down on a grating on the south side of said building, when Bagley, who seems to have been sitting on the water-table under one of the front windows of the building, and in front of McElhaney, protested against McElhaney continuing to abuse Casey. Whether or not Bagley had a knife in his hand or possession at that time does not appear. The boy, however, was attempting to escape; but at the corner of the building being hindered by meeting some one, McElhaney seized him. Finding that he could not escape, he turned quickly and threw McElhaney down. The testimony shows that the light from the saloon windows did not extend east of the building, and that it was dark where this conflict took place. This conflict, as the testimony shows, lasted from one to three minutes, and the strong man, who but a few minutes before was able to take the policeman and Casey and knock their heads together, was held prostrate by a boy, and his whole demeanor changed from that of an aggressive bully to a

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peaceable man, as one witness testifies, "When Bagley left Mc., Mc. raised up, and he looked to me to be hurt; he raised up slow; I noticed something peculiar in his conduct. The peculiarity was that he didn't make any effort to fight." And of another witness, that he "found blood on the sidewalk around the corner where the scuffle was." Also the statement of McElhaney that "it was the little fellow who stabbed him in the breast." We turn now to the testimony which it is claimed shows that Casey struck McElhaney with a knife. There is no proof whatever that Casey had a knife on that occasion. None was found on his person or near where this second scuffle is said to have taken place. The testimony is, that prior to this alleged scuffle McElhaney had ceased his belligerent attitude. All the witnesses testifying upon that point state that he acted as if there was something the matter with him. The wounds, too, it will be observed, all ranged from the right side toward the left. So far as we can gather from the testimony, they were such wounds as would have been given by the backward stroke of a knife held in the right hand of a person pursued, against the pursuer, with the blade pointing backward, and such as could have been given by Bagley when McElhaney was in pursuit of him. Such wounds could not have been given by Casey standing face to face with McElhaney, if he used his right hand, and it is not claimed that he is left-handed, or struck with his left hand; and it is not very probable that McElhaney, if well, would have permitted Casey, without resistance, to stab him at least half-a-dozen times. If we give all the testimony against Casey its greatest possible weight, it does no more than create a probability that he stabbed McElhaney; but this is not sufficient. Where circumstances are relied upon to secure a conviction, they must be of such a character that when taken together they are of so conclusive a nature and tendency as to lead to a satisfactory conclusion, and produce in effect a reasonable and moral cer-

tainty that the accused and no one else committed the offense charged. It is not sufficient that the circumstances produce a probability, though a strong one. It is essential that the circumstances, taken as a whole, and giving them their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis except that of the guilt of the accused. *Com. v. Webster*, 5 Cush., 319.

Starkie states the rule as follows: "The force of circumstantial evidence being exclusive in its nature, and the mere coincidence of the hypothesis with the circumstances being in the abstract *insufficient unless they exclude every other supposition*, it is essential to inquire with the most scrupulous attention what other hypothesis there may be which may agree wholly or partially with the facts in evidence." Starkie on Ev. (10 ed.), 863. *Rex v. Hodge*, 2 Lewin C. C., 227. 3 Greenleaf Ev., § 137, and notes. The testimony fails to reach that degree of certainty as to exclude every other reasonable hypothesis except that of the guilt of the accused, and is insufficient to sustain a conviction.

2. Newly discovered evidence.

This evidence is set forth in the affidavit of Jephtha Sturgeon, who at the present time resides in Rush county, Kansas. He deposes that he is twenty-three years of age, and formerly resided at Hopkins, in the state of Missouri; "that on the 15th day of November, 1884, he was visiting relatives at the town of Wymore, Nebraska; that he saw McElhaney and Casey in the opera house saloon; that he heard them quarreling, and saw the bar-tender put Casey out doors; saw McElhaney follow Casey out onto the sidewalk; saw McElhaney throw Casey down on the grating, and one of Casey's legs went through the grating and tore Casey's pantaloons leg. McElhaney struck Casey several times in the face and nose, and made the blood flow freely from Casey's nose. While McElhaney was beating Casey, a little smooth-faced, sharp-faced looking young

man said 'it was too d—d bad to see a young man impose on an old one that way.' McElhaney said to this little fellow something, and jumped up and took after him; the little fellow had been standing up on the water-table of the building, and when McElhaney started after him the little fellow run around the corner of the saloon. Then affiant crowded his way through and went around the corner, and there saw the little fellow on, or rather over, McElhaney, holding him with one hand and striking him with the other. Almost every lick he struck he said, 'God damn you, will you impose on an old man,' or something of that kind. I turned as quick as I could and said to some one, 'He is cutting McElhaney all to pieces with a knife.' I saw the blade of the knife shining in the hand of the little fellow; I saw him strike McElhaney as he lay on the walk on his back four or five times. I never saw either McElhaney or Casey any more. I afterward learned that the little fellow's name is John Bagley. I left there right away and went home, because I did not want to be detained there as a witness away from home." He returned home on the train next morning after the killing of McElhaney. In this he is corroborated by the conductor of the train.

One Thomas Doyle also makes an affidavit to substantially the same facts as Sturgeon.

It is claimed on behalf of the state that it is apparent that the facts stated in these affidavits are untrue, and that the preponderance is largely with the state. It is also suggested that the evidence is cumulative. The testimony of Sturgeon, who claims to have witnessed the striking of McElhaney by Bagley with a knife, is certainly very material to the accused, as also that of Doyle. In such case the court will not assume that the newly discovered evidence is false. That is a question for the jury to determine. For the purpose of the motion it will be assumed to be true. Neither is such evidence cumulative. There are some exceptions to the rule that a new trial will not be granted for newly dis-

covered cumulative evidence, as where such evidence is sufficient to render clear what was before a doubtful case. *Barker v. French*, 18 Vt., 460. *Waller v. Graves*, 20 Conn., 305. In the case last cited it is said (p. 310): "By cumulative evidence is meant additional evidence of the same general character to the same fact or point which was the subject of proof before. *Watson v. Delafield*, 2 Caines, 224. *Reed v. McGrew*, 1 Hammond, 386. *Smith v. Brush*, 8 Johns., 84. *Pike v. Evans*, 15 Johns., 210. *The People v. The Superior Court*, 5 Wend., 114; S. C., 10 Wend., 285. *Guyott v. Butts*, 4 Wend., 579. *Gardiner v. Mitchell*, 6 Pick., 114. *Chatfield v. Lothrop*, Id., 417. *Parker v. Hardy*, 24 Pick., 246. * * * Evidence which brings to light some new and independent truth of a different character, although it tends to prove the same proposition or ground of claim before insisted on, is not cumulative within the true meaning of the rule on this subject." That case was an action for libel, and the question was, whether the words "rapacious creditor" were in the article as written by the defendant, or had been inserted by another without the defendant's knowledge. On the trial the defendant had testified that the objectionable words were not in the writing when signed by him. Afterwards he discovered evidence to the effect that the objectionable words had been inserted by the editor of the paper without the defendant's knowledge or consent. The facts were similar to the case at bar in this, that the newly discovered evidence would show by whom the offense was committed. We think, therefore, that the newly discovered evidence was sufficient to require the court to grant a new trial.

3. That the verdict does not respond to each charge in the indictment.

In *Wilson v. The State*, 20 Ohio, 26, it was held, under a statute from which ours was copied, that where *distinct* offenses are charged in separate counts of an indictment the jury must either return a general verdict or else respond

to each charge in their finding. This decision was quoted with approval in *Williams v. State*, 6 Neb., 343. In *Wilson v. State* it is said: "We think it prudent in the case of distinct and independent offenses, especially where they are made so by statute, and are subjected to different degrees of punishment, to require the jury, in the absence of a general verdict, to affirm or negative each charge in their finding." This rule having been adopted by the supreme court of the state from whence our statute was copied, as said by LAKE, Ch. J., in *Williams v. State*, 6 Neb., 342 "We feel bound to follow the Ohio cases, not alone from the fact that in view of our legislation they are entitled to special consideration, but because they adhere more closely to the letter of the statute, and tend to greater certainty in fixing the grade of the offense." Where there are *distinct* offenses charged in the different counts of the indictment the jury must either return a general verdict of not guilty or respond specially to each charge in the indictment.

We see no error in the instructions, and none of the other errors assigned are preserved in a form to be available to the prisoner.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

E. D. WHEELOCK, APPELLEE, v. SAMUELL McDOWELL
ET AL, APPELLANTS.

Municipal Corporations: SALARY OF OFFICERS. When, at the time of the election of the officers of a city of the second class, no ordinance had been passed fixing their salaries, an ordinance during their terms of office, fixing their salaries at a sum within a limit prescribed by the charter, is not within the inhibitions of the law that their compensation shall not be increased or diminished during their term of office. *State, ex rel., v. McDowell*, 19 Neb., 442, followed and approved.

APPEAL from Gage county district court. Heard below before BROADY, J.

The facts were as follows: At the general election in April, 1885, the defendants were elected mayor, councilmen, etc., of the city of Beatrice, Nebraska. On May 21, 1885, the mayor and common council caused the city's charter to be so changed as to bring the city into the rank of cities of the second class, of more than 5,000 inhabitants, under which ordinances might be passed giving the mayor \$500 a year, the councilmen \$300 a year, etc. Prior to this time no ordinance could be passed giving the mayor a salary of more than \$200, or the councilmen more than \$50, etc. In September, 1885, an ordinance was passed giving the mayor and the councilmen salaries on the basis of cities of the second class, containing 5,000 inhabitants and more. No ordinance had ever been passed, prior to this time, fixing the salaries of the city officials of Beatrice. Sections 75, 162, Chap 14, Comp. Stat., provides that the "emoluments of no officer * * * shall be increased or diminished during the term for which he shall have been elected or appointed." The plaintiff sought to restrain by injunction the city officials from collecting their salaries. Judgment for plaintiff, and appeal by the defendants.

Griggs & Rinaker, for defendants and appellants.

There is an essential difference between an increase or diminution of salary and a creation of salary. *Purcell v. Parks*, 82 Ill., 346. *Rucker v. Supervisors*, 7 W. Va., 661. *State v. McDowell*, 27 N. W. Rep., 433.

Hardy & McCandless, for plaintiff and appellee.

The powers of cities of the "second class," with respect to the salaries of their officials, are fixed by law. Const., art. 8, § 16. Comp. Stat., 131, § 7. Id. 161, § 15. Id. 148, § 75. Id. 162, § 29. Municipalities are confined "within the limits that a strict construction of the grants of powers in their charters will assign to them." *Dunham v. Rochester*, 5 Cow., 465. If no law of the state has fixed the fees or pay of town officers, their services must be gratuitous. 1 Dill. Mun. Corp. (2d. Ed.), § 170, note 1. *Smith v. Com.*, 41 Pa. Stat., 335. *Boyden v. Brookline*, 8 Vt., 284.

REESE, J.

The question involved in this case is identical with that in *State, ex rel. Wagner, v. McDowell*, decided by this court during the preceding term—since the decision in this case by the district court—and reported in 19 Neb., 442.

We have re-examined the legal propositions, and are satisfied with the conclusions to which we arrived in that case. We are also satisfied with the reasoning of Chief Justice MAXWELL in the opinion written by him, and shall not attempt to improve thereon by a re-discussion of the question.

The decision of the district court is reversed and the cause dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

H. H. HASSETT, APPELLEE, V. D. S. CURTIS, APPELLANT.

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1. **Pleading:** ANSWER: GENERAL DENIAL. An answer, consisting of a general denial of each and every allegation in the petition, places in issue all the allegations contained therein. *Donovan v. Fowler*, 17 Neb., 247.
2. ———: ———: MECHANIC'S LIEN. In an action to foreclose a mechanic's lien on real estate for material furnished in the construction of a building thereon, an answer consisting of a general denial is a denial of the allegations of the sale of the material for the purpose alleged, and of the ownership of the real estate upon which the lien is sought to be established, and the burden of proof is upon the plaintiff to prove all facts necessary to the existence of such lien.

APPEAL from Johnson county district court. Heard below before BROADY, J.

L. C. Chapman, for appellant.

Appelget & Son, for appellee.

REESE, J.

This was an action to foreclose a mechanic's lien. The decree in the district court was in favor of plaintiff, and defendant, D. S. Curtis, appeals.

Appellant insists that the petition does not state a cause of action against defendant and the property sought to be affected, but as the abstract furnishes no information as to the allegations of this pleading we cannot decide as to its merits.

The next contention is, that the evidence adduced on the trial was not sufficient to sustain the finding of the court, and that no cause of action was proved on the trial.

As the testimony adduced on the trial was very short we copy the same in full. It is as follows:

Hassett v. Curtis.

Plaintiff in his own behalf testified:

Q. 1. Are you the plaintiff in this case?

A. I am.

Q. 2. Will you look at that account (handing witness a paper) and see if that account is due and remains unpaid?

A. Yes, the balance here has never been paid.

Q. 3. Also as to the affidavit attached to the account. Is that the original affidavit you filed in the county clerk's office and obtained a lien?

A. Yes, the same as I signed.

Q. 4. Has any part of that account been paid, except as endorsed on the account?

A. That is all that has been paid.

Plaintiff offers in evidence the account attached to the pleadings.

Q. 5. How much is due upon this account?

A. \$36.46. That is after \$74.80 has been paid. The balance due is \$36.46 and interest.

Q. 6. When was that due? When was that \$36.46 due?

A. It was due at that time.

Q. 7. Now the date?

A. The day it was put on.

Q. 8. Was it a cash item?

A. That \$74 was a cash item.

Q. 9. Was the bill due when the material was furnished?

A. Yes, he agreed to pay it within sixty days' time. I sold the material and he did not do it.

CROSS-EXAMINATION.

Q. 10. These articles were furnished at the time set out in this bill.

A. Yes, it is all the same bill.

Q. 11. To whom did you furnish this material, and who owes you for the same?

A. Mr. D. S. Curtis.

This testimony, uncontradicted as it is, is sufficient to sustain the finding of indebtedness, and would support a judgment for money only. But we fail to find any proof which would justify a finding that the lumber was furnished by virtue of a contract, express or implied, for the construction or reparation of any building or other improvement on the land of appellant, or that the material was used by him for any such purpose.

We are informed by the abstract that the answer contained a general denial of the allegations of the petition. This requires proof upon every material allegation therein not admitted of record to be true. *Maxwell's Pleading and Practice*, 127. *Donovan v. Fowler*, 17 Neb., 247.

It is shown that the statement of account and affidavit filed in the office of the county clerk for the purpose of securing the lien, were offered and received in evidence, but neither party gives us any light in his abstract as to the contents of these papers. This was unnecessary, perhaps, as it could not be claimed that they would furnish competent evidence of the facts necessary to be proven, they being evidence only of the fact of their filing within the time required by law and of their own contents as touching their sufficiency. There was, therefore, no evidence to support the decree, so far as the enforcement of the mechanic's lien is concerned.

The decree of the district court will therefore be set aside, and the cause remanded to that court, with directions to re-try the cause if plaintiff so desires; or in case he should so elect, to render judgment in his favor for the amount found due on the previous trial.

REVERSED AND REMANDED.

THE other judges concur.

JANE BUCHANAN ET AL., APPELLANTS, v. NATHAN K.
GRIGGS ET AL., APPELLEES.

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| 20 | 185 |
| 45 | 232 |
| 45 | 646 |
| 80 | 165 |
| 51 | 429 |

1. **Jurisdiction: EQUITY.** A court of equity, having obtained jurisdiction of a cause, will retain it for all purposes, and render such decree as will protect the rights of the parties before it, and thus avoid unnecessary litigation.
2. **Injunction to restrain enforcement of decree.** Where a decree has been improperly obtained, and a party defendant has been deprived of his defense by the conduct of the successful party, who had no cause of action, and whose rights had been adversely adjudicated in another suit, he will be enjoined from enforcing such decree.

MOTION to correct mandate, etc., in case reported 18 Neb., 121.

L. M. Pemberton, for appellants.

Griggs & Rinaker and *W. H. Ashby*, for appellees.

1. A court of equity will not issue an injunction to restrain the execution of its own decree. *McReynolds v. Harshaw*, 2 Ired. Eq., 196. *Rickett v. Johnson*, 8 Cal., 34. *Gorham v. Toomey*, 9 Cal., 77. *Platto v. Deuster*, 22 Wis., 482. *Dayton v. Relf*, 34 Wis., 86. *Endter v. Lennon*, 46 Wis., 299.

2. Where there is a statutory remedy for correcting a decree obtained by fraud such remedy is exclusive. *Tecumseh Town Site Case*, 3 Neb., 284. *Railroad Co. v. Whitacre*, 8 Ohio St., 590. *State v. Marlow*, 15 Ohio St., 114. Code Neb., § 602, subd. 4.

REESE, J.

This case was originally decided at the July term, 1885, of this court, and is reported in 18th Neb., page 121.

A mandate was issued in accordance with the judgment, and sent to the clerk of the district court from whence the appeal came.

On the 25th of May of the present year, the defendants again appeared in this court, and filed a motion seeking a change in, or correction of, the mandate, so as to make it apply only to this case. Plaintiffs also appeared and sought a modification of the decree in this court to the extent that the cause should not be remanded to the district court, but that a final decree shall be entered here, making the injunction perpetual.

We have again considered the whole case, and are confirmed in our belief that the prior holding was correct, and that the foreclosure of the mortgage executed by Samuel Jones to John Armstrong was an extinguishment of all the rights of John Jones and his grantees, Griggs and Ashby, and that the proceedings instituted by them to foreclose the mortgage made to them by John Jones cannot be maintained.

It is a well-settled principle of equity jurisprudence that where a court of equity has obtained jurisdiction of a cause for any purpose it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation. *Swift v. Dewey et al.*, ante p. 107.

The issues formed in the district court, and upon which the trial was had, presented all the questions which could have been litigated in the cause. Proofs were taken at length, and all the questions in the case were presented to the court for adjudication. Upon more mature deliberation we are all of the opinion that the proper decree for the district court to have rendered would have been to perpetually enjoin further proceedings in the foreclosure suit founded upon the mortgage executed by John Jones to Griggs and Ashby. Such being our view of the case, a decree will be so entered in this court.

DECREE ACCORDINGLY.

THE other judges concur.

R. C. BULLIS ET AL., PLAINTIFFS IN ERROR, v. BENJAMIN DRAKE, DEFENDANT IN ERROR.

1. **The Evidence** examined and *Held* to sustain the verdict.
2. **Trial: CONDUCT OF ATTORNEY.** Where it is alleged that an attorney in the argument of a cause on trial to a jury made misstatements of the evidence, and went outside of the record in his statements of the facts proved on the trial, the attention of the court should be called to the language and conduct of the attorney by the proper objection, and a ruling had thereon by the court. If the objection is overruled and an exception taken, the question may be reviewed in the supreme court, upon the language, objection, ruling, and exception being made a part of the record by the proper bill of exceptions, but not otherwise. *Bradshaw v. The State*, 17 Neb., 147. The case of *The Cleveland Paper Co. v. Banks*, 15 Neb., 20, examined and distinguished.

ERROR to the district court for Richardson county.
Tried below before BROADY, J.

E. W. Thomas and *C. Gillespie*, for plaintiffs in error.

E. B. Stevens and *Isham Reavis*, for defendant in error.

COBB, J.

This was an action of replevin brought by the defendant in error against the plaintiffs in error. There was a trial to a jury, with verdict and judgment for the plaintiff in that court. The defendants below bring the cause to this court on error.

Plaintiffs in error by their petition in error present the following points:

1. The district court erred in overruling the motion for a new trial.
2. The verdict of the jury is contrary to the evidence, and is not sustained by the evidence, and is contrary to law and to the instructions of the court.

3. The court erred in refusing to set aside the verdict on account of the misconduct of the attorney of defendant in error in his argument to the jury in making statements outside of the record in the case.

4. The court erred in admitting in evidence statements said to have been made by Albert F. Pool when neither defendants nor their agent were present.

5. The court erred in giving the instructions asked for by defendant in error.

The first error assigned is merely formal. The only grounds upon which a new trial was or could have been claimed are those set forth in the other errors assigned, and they will be considered in their order.

The second error assigned is based upon the evidence. Is it sufficient to sustain the verdict?

The undisputed facts of the case may be stated as follows: Mrs. M. E. Gandy, the principal defendant, was the owner of certain live stock, consisting of one two-year-old mule colt, one dark red two and one-half year-old bull, four cows, two heifers, six sucking calves, two last spring's calves, and two steers. This stock she sold to a young man named A. F. Pool. On the 15th day of October, 1881, A. F. Pool, for the purpose of securing the payment of his promissory note of that date, payable to M. E. Gandy or bearer, October 15, 1882, for the sum of three hundred thirty-one dollars and twenty cents, with interest at ten per cent, executed to said M. E. Gandy a chattel mortgage in the usual form of and upon all of the said live stock. A copy of this mortgage was filed in the county clerk's office on the 19th day of the same month. The following endorsement also appears upon said copy: "Oct. 22. I hereby release six head of cows in this mortgage, and take instead 13 head of 13 months old steers in another mortgage, 6 cows at \$35, \$210." On the 1st day of November following, A. F. Pool made a public sale at the residence of J. P. Pool, four or five miles from Humboldt

—the residence of the Gandys—at which a number of head of cattle, horses, farming implements, and a mule answering the description of the mule described in the said chattel mortgage, and doubtless the same mule, were sold at public vendue. The mule was bid off and purchased by R. W. Coleman. Coleman kept the mule about a month and then sold it to the defendant in error. Towards the last of January, 1882, M. E. Gandy placed the chattel mortgage in the hands of her co-plaintiff in error for foreclosure, who as her agent seized the said mule upon said mortgage, and thereupon the defendant in error brought the action of replevin and replevied the said mule. During all the time of these transactions, Dr. J. L. Gandy, the husband of M. E. Gandy, was her duly authorized agent, and for her transacted all of her part of the business connected therewith. It is also an undisputed fact, that some time near the middle or latter part of the month of October, 1881, a quantity of posters or notices of said sale were printed at the office of the *Farmer's Advocate* newspaper, at Humboldt, Richardson county, and that said posters contained a description of said mule as one of the articles of property to be sold at said sale. The evidence as to nearly or quite all of the other facts involved in the case is conflicting. The preponderance of the evidence, so far as can be gathered from reading the bill of exceptions, is to the effect that the printing office above referred to was, during the entire period of the transactions involved in this case, owned, controlled, and managed by parties not connected in any manner with this case. And particularly, that the only connection of the Gandys with said printing office or newspaper consisted in the fact that Dr. Gandy had contributed the sum of ten dollars to the fund with which the said office had been bought by the then present owners, and for which he was to have received stock to that amount whenever the joint stock company, by which the said enterprise was to have been carried on, should be fully or-

ganized. But it cannot be denied that there is evidence tending to prove that during the whole of the months of September, October, and November, 1881, and especially at the time when the said posters or notices of sale were printed, Dr. J. L. Gandy was the editor and manager, and had the control of said newspaper and printing office. That he employed a man to set the type and print the said paper and do such job printing in said office as might be demanded. Also that during the said months the said Albert F. Pool was employed by said Dr. Gandy as a hired man in and about the said printing office. Also that some time previous to the 1st day of November, 1881, the posters or handbill notices of said sale, were printed at said printing office, that Dr. J. L. Gandy read the proof of said posters before they went to press, and that after they were printed, they were by the printer delivered to said Gandy, who took them to his drug store, where some of them were kept on exhibition to the public, and from whence some of them were distributed. And also that about a week before the time fixed for said sale Dr. Gandy wrote, handed into said printing office, and ordered, and caused to be printed and published in said newspaper, a local notice calling attention to the said sale.

It is evident that the jury believed this evidence, and disbelieved that which conflicts with it; and if they did, although, as above stated, from the reading of the bill of exceptions the conflicting evidence would seem to be entitled to the greater weight, their verdict as it is, is but the legal and logical result of such belief. If the evidence above referred to as having been believed by the jury is true, then the Gandys, husband and agent, and wife, and principal, are bound by the sale. That evidence, on its face, sufficiently establishes the fact that A. F. Pool was in the employment of the Gandys when the sale was made; that Dr. Gandy (who by their own testimony is shown to have been at that time acting as the agent of M. E. Gandy)

not only knew that the stock, including the mule in question, was going to be offered at public sale, but he actively engaged in inducing the public to attend said sale and become purchasers of said property.

In this connection I will briefly refer to another ground upon which alone the judgment would probably be affirmed. Sec. 11, of Chap. 32, Compiled Statutes, provides as follows :

“ Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith ; and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the person claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers.”

By the above provision the law attaches a presumption of fraud to the mortgage transaction in question, in favor of the defendant in error, if his vendor, Coleman, who bought the mule at the sale was a purchaser in good faith. There was evidence which warranted the jury in finding in favor of the good faith of the purchase. There was but little evidence tending to remove the presumption of fraud in the transaction between the Gandys and Pool as evidenced by the chattel mortgage ; and while I will not say that the jury might not have been satisfied of its sufficiency for that purpose, I do say that as they did not so find, their verdict must be upheld.

As to the third point, that “ the court erred in refusing to set aside the verdict on account of the misconduct of the

attorney of defendant in error, in his arguments to the jury in making statements outside of the record in the case, it cannot be sustained. I presume that this point is presented under the second clause of section 314 of the code of the enumeration of the grounds for the allowance of a new trial. The language of the clause is: "*Second, Misconduct of the jury or prevailing party.*" The corresponding clause of section 490 of the criminal code, which is devoted to the subject of new trials in criminal cases, is in the following language: "*Second, Misconduct of the jury, or the prosecuting attorney, or of the witnesses for the state.*" I know of no statute, certainly none is cited, which in terms provides for the granting of a new trial for misconduct of the *attorney* of the prevailing party. Yet undoubtedly, a verdict would be set aside and a new trial awarded for such misconduct as the bribery of a juror, or subornation of perjury in a witness, by whomsoever committed, in the interest of the prevailing party; but I do not think that the manner of conducting a trial (by counsel), however vicious, or any words used by counsel in arguing a cause to a court or jury, can be construed to be misconduct of the prevailing party in the sense of the clause above quoted from the civil code. And yet the injured party in such cases is by no means without a remedy if he is mindful of his rights as the cause proceeds.

A question involving the principle now under examination was, for the first time so far as my information extends, presented to this court in the case of *Cropsey v. Averill*, 8 Neb., 151. The opinion of the court was unanimously concurred in. I quote the eighth clause of the syllabus: "8. One ground of error assigned was the misconduct of the opposing counsel in their argument to the jury, prejudicial to the plaintiff in error. But it was not shown by the record that they were called to order, nor that the court was requested to confine them within the bounds of legitimate discussion. *Held*, That while the offense com-

plained of, if properly presented, would be good ground for a reversal of the judgment, still, as the record does not show any ruling by the court below respecting it, there is no question for this court to review."

The above case has been adhered to by this court, without exception. *C., S. P., M. & O. R. R. v. Lundstrom*, 16 Neb., 254. *Bradshaw v. The State*, 17 Id., 147. *McLain v. The State*, 18 Id., 154.

The case of *Cleveland Paper Co v. Banks*, 15 Neb., 20, constitutes no break in the above line of decisions. A careful examination of that case will show that the judgment was reversed and a new trial awarded for misconduct of the prevailing party, and that this misconduct consisted in the persistent effort, by one of the attorneys of the defendant in error, in the course of the trial in the court below, to prove and get before the jury the alleged fact, that one Smith, the secretary of the company of which defendant in error was the president, had embezzled the funds of the said company. It is true the opinion recites the fact that, in the course of the argument of the cause to the jury, one of the counsel for the defendant in error used the following language, which was quite outside of the case: "The history of Smith, you know; they told you directly after those goods were shipped, Smith went away with property that was not his own." But it also appears that "the plaintiff's attorneys objected to the use of this language, and the court restrained the attorney from making such statement." Certainly this could not have been held error. As an individual member of the court, I doubt that any application, motion, or proceeding, made or sought to be made by counsel in open court, under the eye and within earshot of the presiding judge and opposing counsel, can be held to be misconduct of the prevailing party within the meaning of the statute. But certainly, in a case like the one at bar, where the alleged misconduct consisted in an irrelevant statement by counsel, for which he was

not even called to order by opposing counsel, nor the attention of the court called to it, except for the purpose of getting the language used into a bill of exceptions, no error can be predicated upon it.

As to the fourth error assigned, upon a careful examination of the bill of exceptions, I fail to find any fact to which the same is applicable.

The fifth and last error assigned is, that "The court erred in giving the instructions asked for by defendant in error."

This assignment is not urged in the brief, and so will be regarded as abandoned.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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THE STATE OF NEBRASKA, EX REL. D. F. OSGOOD, v.
JAMES F. KINZER.

THE STATE OF NEBRASKA, EX REL. SAMUEL LICHTY, v.
M. W. MUSSELMAN ET AL.

1. **Township Organization.** The question of adopting township organization was submitted to the legal voters of R. county at the general election in 1883, and was adopted by a majority of the legal voters of said county voting at said election, but no organization of the board of supervisors has yet taken place. *Held*, That township organization is in force in R. county, to be complete upon the organization of the board of supervisors as provided by law.
2. —: **DISCONTINUANCE.** An election to discontinue township organization, unless authorized by statute, is of no avail, and votes cast thereat are nullities.
3. —: **CHANGE OF COUNTY GOVERNMENT.** In a county which has adopted township organization, the board of county commissioners continue to act until the board of supervisors has met and organized.

ORIGINAL actions in *quo warranto* and *mandamus*.

John Saxon, Isham Reavis, and E. W. Thomas, for relators.

Frank Martin, for respondents.

MAXWELL, CH. J.

Both of these cases involve the question of township organization in Richardson county, and may be considered together. It appears from the record that township organization was adopted in said county by a majority of the legal voters voting at the general election in 1883; that township officers were not generally elected at that time, and no attempt was made to organize the board of supervisors; that in the year 1884 the question of discontinuing township organization was submitted to the electors of said county at the general election and was adopted by a small majority. Since that time supervisors have not generally been elected in the several townships, and there is now no full board, the business of the county during all the time since the adoption of township organization having been conducted by county commissioners.

The first question presented is whether or not township organization is now in force in Richardson county.

Section 2 of the act relating to township organization [Comp. Stat., Ch. 18, Art. IV.], provides that: "The county commissioners, on petition of fifty or more legal voters, shall cause to be submitted to the voters of the county the question of township organization under this act, by ballot, to be written or printed, or partly written or partly printed, 'For township organization' or 'Against township organization,' the votes to be canvassed and returned in the same manner as votes for county officers."

Sec. 3 provides that: "If it shall appear by the returns of

said election that a majority of the legal voters voting at said election are for township organization, then the county so voting for its adoption shall be governed by and subject to the provisions of this act on and after the first day of the meeting of the county supervisors as hereinafter provided."

Sec. 5 provides that: "In case a majority of the legal votes cast at said election shall be 'for township organization,' and the electors have chosen supervisors in a majority of the precincts of the county, as provided in the preceding section, there shall be held a special meeting of the newly elected county board, commencing on the fifteenth day after such election, at the county seat, and when such board shall have *met and organized*, the power of the county commissioners of such county shall cease and their offices become vacant. * * * * * In case of failure to elect proper town officers at said election, then such county shall not be governed by this act until the first Tuesday in January following the next general election after the adoption of township organization," etc.

There are other provisions in the statute to which it is unnecessary to refer.

It being conceded that a majority of the legal voters of said county, voting at the general election in 1883, voted for township organization, the proposition was adopted, and township organization is now in force in Richardson county unless it was discontinued by the vote of 1884.

2. It is admitted that there was no authority under the statute for the election of 1884, discontinuing township organization. An election to be valid must be authorized by statute. If it is not, votes cast thereat are simply nullities. Opinion of the Judges 7 Mass., 525. Same, 15 Id., 537. Cooley Const. Lim., 603. *State v. Young*, 4 Iowa, 561. *Barry v. Lanch*, 5 Cold., 588. Dillon on Mun. Corp., § 136. The election for the purpose of discontinuing township organization, being held without author-

ity of law, was a nullity, and township organization is now in force in Richardson county.

3. At what time will township government supersede that of the county commissioners? It will be seen that the statute provides that when supervisors have been chosen in a majority of the precincts of the county, they shall hold a special meeting, commencing on the 15th day after the election; and when such board shall have met and organized, the power of the county commissioners shall cease; but in case of the failure to elect the proper town officers at such election, then the county shall not be governed by the township organization law until the first Tuesday in January following the election. In case of the failure to organize under the township organization law at either of the times stated, there is no provision that township organization shall thereupon lapse, or be affected in any manner, except that the county commissioners shall continue to exercise their duties until the organization of the board of supervisors. The board of commissioners of Richardson county, therefore, is the legal tribunal for the transaction of the county business of said county, and will continue to be such until superseded by a board of supervisors. As such supervisors may be elected at the general election in November next, and the relief which the plaintiffs seek be obtained by such election, we will make no order in the premises.

The actions are hereby dismissed.

JUDGMENT ACCORDINGLY.

The other judges concur.

OLIVE J. HURSTE, APPELLANT, v. D. W. HOTALING,
IMPLEADED WITH CHARLES V. HURSTE ET AL., AP-
PELLEES.

1. **Attorney: APPEARANCE.** When proceedings in partition were instituted by an attorney in this state, who received his authority from another attorney residing in another state, who claimed to have been employed by the plaintiff, but which authority she denied, *Held*, There being no proof of knowledge of the pendency of the proceedings on the part of the plaintiff, or proof of authority to bring the action, sale under the partition would be set aside.
2. **Dower: DOWER INTEREST INSUFFICIENT TO AUTHORIZE PARTITION.** In this state a widow is entitled to dower, or the use, during her natural life, of one-third part of all the lands whereof her husband was seized, of all estate of inheritance at any time during the marriage, unless she is lawfully barred thereof. A mere dower interest is not sufficient to authorize the person entitled thereto to institute a suit in partition and cause the estate of the heirs to be sold.

APPEAL from Johnson county district court. Heard below before BROADY, J.

S. P. Davidson, for appellant.

An attorney cannot prove his authority to appear for a party by a letter from a third party, even though an attorney, asking him to appear. *Westbrook v. Blood*, 50 Mich., 443; S. C., 15 N. W. Rep., 544. The burden of proof is on the attorney to show that he was authorized to appear. *State Bank v. Green*, 8 Neb., 307; S. C., 1 N. W. Rep., 210. Where a plaintiff has not authorized the institution of a suit, the entire proceedings are void. *McDowell v. Gregory*, 14 Neb., 36; S. C., 14 N. W. Rep., 899; *Clark v. Willett*, 35 Cal., 534, 539; *Frye v. Calhoun Co.*, 14 Ill., 132; *Savery v. Sypher*, 6 Wall., 159.

Appalet & Son, for appellee.

MAXWELL, CH. J.

A petition purporting to have been signed by the plaintiff, was filed in the district court of Johnson county, in October, 1885, in which it is alleged that on the first day of March, 1880, one A. H. Hurste died, seized of the northwest quarter of section twenty-four, in township No. 4, range 10 east, in said county, and left as his only heirs, his widow, the plaintiff herein; Charles V. Hurste, aged 12 years; J. B. Hurste, aged 9 years; S. S. Hurste, aged 6 years; and A. H. Hurste, aged 5 years, his children; that he died intestate, and each of said children owns the undivided one-fourth of said land, subject only to the plaintiff's dower interest therein; that said land is uncultivated, and plaintiff is the mother of said children, who are made defendants; and the prayer of the petition is that plaintiff's dower interest in said lands may be set off to her, and if the same cannot be done without manifest injury, then that the said lands may be sold, and that plaintiff's dower interest be found by the court and assigned her in cash; and if, in the opinion of the court, the same cannot be done, then that this court will order that so much of the proceeds of such sale as may be found due her as dower be placed at interest by this court, and the proceeds thereof be decreed to be her interest in said lands; and for such other and further relief as in the opinion of the court may be just and equitable.

Afterwards, C. K. Chamberlain, having been appointed guardian *ad litem* for the minor defendants, after service was made on them by publication, filed his answer and cross petition on November 17, 1885, in which he admits the substantial allegations of the petition, and prays for judgment confirming the shares of the parties herein as above set forth, and partition of said real estate according to the respective rights of the parties therein; or if the same cannot be equitably divided, that said premises may be sold

and the proceeds thereof be divided between the parties so interested according to their respective rights, and for such other and further relief as to this court may seem just.

Referees were appointed, who reported that the land could not be divided without great prejudice to the owners, and the court being satisfied with said report, caused an order to be entered directing the referees to sell the premises, and also to fix the terms of sale. A sale of said land was thereupon made, and the land sold to the defendant. The plaintiff filed a motion to set the sale aside, and supported the same by the following affidavit:

"That she is the Olive J. Hurste whose name has been used as plaintiff in said cause; that she never employed any one to institute said suit, never authorized any one to employ any one to do so; that her name has been used as plaintiff entirely without her knowledge or consent; that she does not want, and never has wanted, her dower set off or in any way taken out of said land; that defendants in said cause are all minors, and are living with and being cared for by her; that she does not need the proceeds of the sale of the land to pay for the care, board, clothing or education of said minors; that it will be best for the interest of said minors and herself to retain said land undivided; that said land is worth more than \$2,000; that she has been recently offered that sum for it; that she never knew said suit was brought in her name as plaintiff until long after decree had been entered, and she does not consent to be bound by it or any of the proceedings therein."

The motion to set aside the sale was overruled, and on motion of said defendant—the purchaser—the sale was confirmed. The attorney who instituted the proceedings in this state was employed by an attorney in Pennsylvania, near where the plaintiff resides. None of the business was transacted directly with the plaintiff, and there is no satisfactory evidence that she was aware that the proceedings in question were pending. Had she been aware of

the pendency of such proceedings, and made no objection, it would now be too late to object; but the proof fails to show such knowledge. The authority of the attorney in this case to institute proceedings being denied, there being no sufficient proof either of employment or that the plaintiff knew of the pendency of the action, the motion to set aside the sale must be sustained.

2. In the argument of this case no objection was made to the authority of the plaintiff to bring or maintain the action. It will be observed that the petition alleges that the land in question belongs to certain *heirs*, the children of plaintiff, and is "subject only to the plaintiff's dower interest therein." The prayer is "that plaintiff's dower interest in said lands may be set off to her, and if the same cannot be done without manifest injury, then that said lands may be sold and that plaintiff's dower interest be found by the court and assigned to her in cash," etc.

Sec. 1, Chap. 23, Comp. St., provides that: "The widow of every deceased person shall be entitled to dower, or the use, during her natural life, of one-third part of all the lands whereof her husband was seized, of all estate of inheritance at any time during the marriage, unless she is lawfully barred thereof."

Sec. 8 provides the manner in which dower may be assigned, which is to be "by metes and bounds when it can be done without injury to the whole estate."

Sec. 10 provides that: "When the estate out of which dower is to be assigned consists of a mill or other tenements, which cannot be divided without damage to the whole, and in all cases where the estate cannot be divided by metes and bounds, the dower may be assigned of the rents, issues, and profits, to be had and received by the widow as a tenant in common with the owners of the estate."

Sec. 802 of the Code provides that: "All tenants in common, or joint tenants of any estate in land, may be compelled

to make or suffer partition of such estate or estates in the manner hereinafter provided."

The controlling principle in partition, therefore, without regard to the extent or quantity of the interest, is that the parties shall be joint tenants or tenants in common of an estate in the land. Subsequent sections of the statute permit, if they do not require, other persons having particular, qualified, or reversionary interests, such as a tenant for years, in dower, or persons having liens on the land, to be brought in, in order that their rights may be determined in the action. Only joint tenants or tenants in common of an estate in the land, however, can institute the proceedings.

In *Woods v. Clute*, 1 Sandf. Ch., 201, the court, in speaking of tenants for years, by the courtesy or in dower, persons entitled in reversion or remainder, and creditors having liens, says: "These may be made parties to the partition, but there appears to be no authority for their instituting it, unless they are also tenants in common in possession."

And in *Coles v. Coles*, 15 Johns., 319, the right of a widow to proceed under the statute for the partition of lands to have her dower assigned was denied.

A tenant in dower who has no interest in the land itself, but has the mere "use during her natural life of one-third part of all the lands whereof her husband was seized," etc., would appear to have no such interest in the land itself as to cause its partition and sale. The principle of partition is to set off in severalty to each owner such portion of the estate as he is entitled to, and a sale is ordered only where such division cannot be made without serious injury to the property. But one who has no estate in the land itself has nothing therein to be apportioned as a part of the estates although, where partition is made in a proper case, the interest of the tenant in dower and other persons having a claim on the land will be protected. The petition fails to show any right of the plaintiff to institute the proceedings,

Wagner v. Evers.

and is entirely insufficient. The judgment of the district court is reversed and the case dismissed.

REVERSED AND DISMISSED.

THE other judges concur.

FREDERICK WAGNER, PLAINTIFF IN ERROR, v. HENRY EVERS, DEFENDANT IN ERROR.

Replevin: CHANGE OF VENUE: APPEAL. Where in an action of replevin before a justice of the peace the defendant filed an affidavit for a change of venue, but failed to pay the costs which had accrued prior to the application for a change, whereupon it was denied and a trial had and judgment rendered from which he appealed, *Held*, That an appeal would lie. *Cleghorn v. Waterman*, 16 Neb., 225.

ERROR to the district court for Cass county.

Beeson & Sullivan, for plaintiff in error.

E. H. Wooley, for defendant in error.

MAXWELL, CH. J.

On the 15th of October, 1885, the defendant herein brought an action of replevin before a justice of the peace to recover the possession of a cow. On the 20th of that month the plaintiff herein filed an affidavit for a change of venue. He failed, however, to pay the costs which had accrued before the change was sought, and the motion was overruled. At the time set for the trial, after waiting one hour, the defendant below (plaintiff in error) not appearing, a trial was had and judgment rendered in favor of the plaintiff below (defendant in error).

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Thereafter, on Oct. 23d, 1885, defendant below filed motion as follows:

"In Justice's court, before G. C. Cleghorn, justice of the peace of Cass county.

"HENRY EVERS, }
VS.
FREDERICK WAGNER. }

"I, Frederick Wagner, defendant in the above entitled cause, move the court to set aside the judgment in this cause for the following reasons: First, because the same was rendered in my absence. And I hereby confess judgment for the costs awarded against me in said action.

"FREDERICK WAGNER,
"Deft.

"It is therefore considered by me that the plaintiff recover from the defendant the sum of \$12.10, his costs in said action. The judgment is conditionally set aside, and the cause set for trial on the 2d day of November, 1885, at 10 o'clock, A.M., by consent of the defendant's counsel or attorney."

Then follow a large number of motions and affidavits, which need not be noticed here, as all alleged errors subsequent to the judgment were waived.

On the 31st of October, 1885, Wagner filed a bond in due form with the justice for an appeal to the district court, which bond was duly approved. The transcript was then duly filed in the district court, when, on motion of the plaintiff below, Evers, the appeal was dismissed, "for the reason that the judgment recovered by this plaintiff against the defendant in justice's court was rendered by default."

There is but a single question presented, viz.: Was the appeal improperly dismissed? This case, so far as the appearance of the defendant below is concerned, is similar to that of *Cleghorn v. Waterman*, 16 Neb., 226, where it was held by a majority of the court that the defendant had the right to appeal. That case must be held to be conclusive in this. The defendant had appeared in the action and was

 Bridges & White v. Bidwell.

not entitled to open the judgment because it was rendered in his absence. He therefore had the right to appeal.

The judgment of the court below is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

BRIDGES & WHITE, APPELLEES, v. OTTO BIDWELL ET AL., APPELLANTS.

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1. **Conveyance by Father to Son: TRUSTS.** Where a father had certain real estate conveyed to his minor son without consideration, and received a note secured by mortgage on said real estate from said son, which note and mortgage he afterwards assigned as collateral security for a debt, the son as against creditors of the father is a mere trustee of such property and cannot plead his minority to defeat the mortgage.
2. **Principal and Agent.** An agent who purchases property without disclosing the name of his principal is personally liable.
3. **Mortgage: ASSIGNMENT: CONVEYANCE BY MORTGAGOR.** Where a mortgage upon certain real estate was duly executed and recorded, and afterwards assigned, but the assignment not recorded, a subsequent deed by the mortgagor and mortgagee will not discharge the mortgage in the hands of a *bona fide* holder, the mortgage remaining on the record unsatisfied.
4. **Duress.** *Held*, That the proof fails to show duress or that the real estate was purchased with the money of the wife.

APPEAL from Johnson county district court. BROADY, J.

Appelget & Son and *S. P. Davidson*, for appellants.

A gift by a debtor to his son, prior to insolvency, is not fraudulent as to subsequent creditors. *Hinde's Lessee v.*

Longworth, 11 Wheat., 200. *Sexton v. Wheaton*, 8 Wheat., 229. It will be considered as an advancement. *Vanzyant v. Davies*, 6 Ohio St., 52.

Field & Harrison, for appellees.

Infancy cannot be used as a protection for fraud. *Tyler*, Inf. & Cov., p. 140, § 94. *Elliott v. Horn*, 10 Ala., 348, 353.

MAXWELL, CH. J.

This is an action to foreclose a mortgage on real estate. The plaintiffs allege in their petition that Otto Bidwell and Clara Bidwell are partners under the name of Bidwell & Brother; that Henry E. Bidwell and Mary Bidwell are the father and mother of said Clara and Otto Bidwell; that during and prior to the year 1884, Bidwell Bro. carried on business in Sterling, Nebraska.

On October 1st Bidwell & Bro. were indebted to Bridges & White for flour furnished in the sum of \$1,121.13, and on said day executed and delivered to Bridges & White their promissory note for said sum, due in ninety days from date, signed Bidwell & Bro.

At the same time, as collateral security for said note of \$1,121.13, said Bidwell & Bro. endorsed and transferred to Bridges & White a note of \$2,500, executed by Otto Bidwell to Henry E. Bidwell, and secured by a real estate mortgage on the west one-half of lot five in block fourteen in the town of Sterling, Neb., and assigned to Bridges & White the said mortgage. Said mortgage was duly recorded.

On April 15, 1885, Henry E. Bidwell paid Bridges & White \$287.28, which sum was endorsed as paid on said note of \$1,121.13.

The said Bidwell & Bro., failing to pay the balance due upon their note of \$1,121.13, the plaintiffs demanded payment of the interest due upon their collateral note and

mortgage of \$2,500 when the same became due, and payment was refused. By the terms of said mortgage the whole sum of said mortgage became due and payable. This action was brought to foreclose the said collateral mortgage. The said Otto Bidwell being a minor, the plaintiffs asked for a guardian *ad litem* to be appointed by the court, and the court appointed A. M. Appelget such guardian.

The defendant, Nicholas F. Hitchcock, procured from the Bidwells, Henry E., Mary, Clara, and Otto, a deed to the premises above mortgaged long after the execution and recording of said mortgages and claims to hold said premises as against said mortgage. The plaintiff asks for a decree of foreclosure against said premises for the balance due upon their note, and setting aside the claim of Hitchcock as to them.

On the 23d day of November, 1885, the defendant, Otto Bidwell, by his guardian *ad litem*, filed his answer and cross bill, stating that at the time of the execution of the said notes and mortgages set forth in the petition of the plaintiffs the said Otto Bidwell was and still is an infant under the age of twenty-one years, that in 1884 he was eighteen years of age.

That on the 27th day of March, 1885, he, being the owner of the premises described in mortgage in plaintiff's petition, executed and delivered to N. F. Hitchcock his deed to said premises; that at said time the said Otto Bidwell was an infant; that repeatedly since the execution of said deed he has renounced, rescinded, and disaffirmed the said contract created by said deed, and now again revokes and disaffirms the same.

The said Otto Bidwell asks that the note and mortgage of the plaintiffs be declared null and void, and that the deed to said Hitchcock be set aside and cancelled as null and void, and that he recover costs.

On the 30th day of November, 1885, the plaintiffs filed their reply and answer to cross-petition of Otto Bidwell, by

his guardian *ad litem*, setting forth that they admit said Otto Bidwell was an infant at the time of the execution of said notes and mortgage.

That plaintiffs for the past three years have been engaged in the manufacture and sale of flour and feed, and doing a general milling business in the state of Nebraska. Between the 1st day of April, 1884, and the 1st day of October, 1884, these plaintiffs sold and delivered to Henry E. Bidwell, defendant, goods and merchandise to the amount of \$1,700. The terms of sale of all the goods delivered to said Bidwell were cash at thirty days from delivery. The defendant, Henry E. Bidwell, failed to meet his payments as agreed, so that upon Oct. 1st, 1884, he was indebted to to these plaintiffs in the sum of \$1,112.13. Plaintiffs demanded payment of said sum from Henry E. Bidwell, who informed plaintiffs that he could not pay at that time, but would give the plaintiffs ample and good security in consideration of the plaintiffs giving said Bidwell an extension for ninety days. Plaintiffs agreed to the extension for the consideration of obtaining good security for their debt.

Defendant Henry E. Bidwell then made and executed the note for \$1,121.13 set forth in plaintiffs' petition, and delivered the same to these plaintiffs. Said Henry E. Bidwell at this same time delivered to the plaintiffs the note of \$2,500, executed by Otto Bidwell to said Henry E. Bidwell, and the mortgage given to secure said \$2,500 note, the note and mortgage being fully set forth in plaintiffs' petition. Said \$2,500 note and mortgage was given by said Henry E. Bidwell as security for the payment of the \$1,121.13 note above mentioned. Said note of \$1,121.13 becoming due, these plaintiffs demanded payment from Henry E. Bidwell, who gave to said plaintiffs a written order directed to one Thomas Lowrey to pay any sum of money that might be due and owing the said Henry E. Bidwell upon a certain corn contract. Said Lowrey accepted said order and paid to said plaintiffs, to apply upon

their said note, the sum of \$287.28, which amount was endorsed upon said note. Plaintiffs still demanding payment from the said Henry E. Bidwell of the balance due upon said note, were informed by Henry E. Bidwell that the Bidwell Bro. whose signature was attached to said note, and which said signature was made by the said Henry E. Bidwell, was the signature of a firm composed of his son and daughter.

Upon the maturing of the interest due upon the \$2,500 note and mortgage, the plaintiffs demanded payment at the place of payment, and the same was refused. The said Henry E. Bidwell then informed the plaintiffs that said \$2,500 note and mortgage were of no value, as the same had been given by his son when a minor.

Plaintiffs allege that Henry E. Bidwell purchased from one A. S. Ellis the premises mentioned in the said mortgage, and that the said Henry E. Bidwell paid the full consideration to said Ellis for said property, and caused the said Ellis to execute a deed to his son, Otto Bidwell, for the sole and only purpose of placing said property out of the reach of the creditors of himself, and for the purpose of hindering and delaying his creditors in the collection of their just claims. The said Otto Bidwell never paid any part of the consideration for said premises, and never had any further or other interest in said premises, except the naked title as above set forth placed in his name by his father for the purpose already mentioned; that the defendant Hitchcock took his deed to said premises with a full knowledge of all the above facts.

The said Henry E. Bidwell caused his son, Otto Bidwell, to execute the \$2,500 note and mortgage on the property, really owned by said Henry E. Bidwell, and Henry E. Bidwell assigned said note and mortgage to secure a just debt due the plaintiffs from said Henry E. Bidwell. Plaintiffs ask that the court will decree that said Otto Bidwell holds said premises in trust for the creditors

of Henry E. Bidwell. That said Henry E. Bidwell is the real owner, and that plaintiffs have a first lien upon said premises, by virtue of their mortgage and facts above set forth, for the full amount of their claim, with costs and interest."

Afterwards, and on January 19, 1886, the defendant Hitchcock filed his answer and cross-petition, setting forth "that one A. S. Ellis was the original owner of the premises described in the petition of plaintiff, and for full value sold the same to Henry E. Bidwell and Mary Bidwell, and at their request conveyed said premises to Otto Bidwell. Afterwards, and on March 27, 1885, Henry E. Bidwell, Mary Bidwell, Otto Bidwell, and Clara Bidwell conveyed said premises for full value to this defendant N. F. Hitchcock, by a good and sufficient warranty deed, covenanting that said premises were free and clear of all incumbrances, and said deed was thereby filed for record, March 30, 1885." Defendant further answers, "That at the time of said conveyance to Otto Bidwell he did not know that said conveyance was made to him for fraudulent purposes, and his conveyance to this defendant was for full value and in good faith. This defendant avers the fact to be that said conveyance to Otto Bidwell was made to defraud the creditors of Henry E. Bidwell, and that at the date of the conveyance of said Henry E. Bidwell and others to this defendant, the said Henry E. Bidwell was the true owner of said premises. The said Hitchcock further avers that at the time of the execution of the notes and mortgages to the plaintiffs, the said Otto Bidwell was an infant, and has repeatedly disaffirmed said acts, and the same are void, and that the debts for which said mortgage was given have been fully paid. Defendant asks that the said mortgage be declared invalid, and the cloud upon the title to said premises caused by the said mortgage be removed, and for costs."

Afterwards the plaintiffs, Bridges & White, filed their

reply and answer to the above answer and cross-petition of N. F. Hitchcock, which need not be noticed.

To this answer of the plaintiffs to defendant Hitchcock's cross-petition, the said Hitchcock files a general denial as a reply; and to the answer and cross-petition of defendant Hitchcock, the defendant Otto Bidwell by his guardian answers, admitting the execution of deed to Hitchcock; alleges that at said time the defendant, Otto Bidwell, was an infant, and disaffirms said act; alleges that said deed was made under duress and without consideration; denies that said property was purchased with moneys belonging to Henry E. Bidwell, and alleges the facts to be that the mother of defendant furnished said money.

Afterwards Hitchcock replied to the above answer, denying each and every allegation therein contained.

On the trial of the cause Charles C. White testified: Am. one of the firm of Bridges & White, doing milling business; became acquainted with Henry E. Bidwell, March, 1884, and the rest of the family afterwards; received note of \$1,121.13, signed Bidwell & Bro., from Henry E. Bidwell, who signed the note himself. This note was given for a balance due us for flour. I received at the same time the note of Otto Bidwell to Henry E. Bidwell for \$2,500 and the mortgage given to secure the same. Henry E. Bidwell endorsed the note and assigned the mortgage to Bridges & White, signing the firm name of Bidwell & Bro. The \$2,500 note and mortgage were given as collateral security for the note \$1,121.13 given for flour; we received upon the \$1,121.13 note \$287.23, April 15, 1885; the balance of said note is due and unpaid. This payment was made by Henry E. Bidwell, who had sold corn to Thomas W. Lowrey, of Lincoln. He gave us an order on said Lowrey for any sum that might be due him upon said corn contract, and upon this order Lowrey paid us the sum of \$287.28. Our first dealings with Henry

E. Bidwell, or with Bidwell & Bro., was the shipment of car of flour, April 21, 1884. We received the order about two weeks prior thereto. During all our transactions the correspondence was carried on, on the part of the Bidwells, by Henry E. Bidwell. He signed the firm name of Bidwell & Bro. I visited Sterling, sold flour, and in all my talks I met no one but Henry E. Bidwell. In all the selling of merchandise I never had a suspicion but that the Bidwell with whom I conversed was one of the brothers. He did all the business, signed the firm name, made every signature that was made. I had no business with any one else. Afterwards I learned he claimed not to belong to the firm.

Plaintiffs offered in evidence exhibit "A," being note from Bidwell & Bro. to Bridges & White, given for merchandise, for the sum of \$1,121.13, dated October 1, 1884, payable ninety days after date, upon which appeared an indorsement of \$287.28. Also exhibit "B," being note for \$2,500, from Otto Bidwell to Henry E. Bidwell, dated Sterling, Neb., April 14, 1884, and payable on or before five years from date, interest payable annually at rate of ten per cent per annum, payable at bank of Sterling, Sterling, Nebraska, note endorsed Henry E. Bidwell. This note was given as collateral security for the note of \$1,121.13. Also exhibit "C," being mortgage on west half lot five in block fourteen, town of Sterling, Nebraska, from Otto Bidwell to Henry E. Bidwell, given to secure the \$2,500 note above set forth and mortgage, dated April 14, 1884, assigned May 18, 1884, from Henry E. Bidwell to bank of Sterling; May 21, 1884, from bank of Sterling to Bidwell & Bro., and October 1, 1884, from Bidwell & Bro. to Bridges & White.

He also testified that he demanded payment of the interest due upon said collateral note and mortgage at place of payment when the same became due, and payment was refused.

Plaintiffs offered abstract showing title to premises set forth in his petition.

L. A. Varner testified: Have been engaged in law business at Sterling for four years; Henry E. Bidwell and Otto Bidwell and A. S. Ellis drew a contract between Ellis and Henry E. Bidwell. [Plaintiff showed loss of contract.] Contract was for purchase by Henry E. Bidwell from Ellis of premises in dispute. Henry E. Bidwell employed me to write contract; Otto Bidwell was not present; I had never met him at that time. Contract provided for the execution of a deed from Ellis to Henry E. Bidwell upon certain payments being made by Henry E. Bidwell. At the time Henry E. Bidwell and A. S. Ellis came to have deed made to this property, Henry E. Bidwell said to me that I might make the deed out to Otto's name—he called him Otty—said he was going to let him have the property, said it was all satisfactory to Ellis. Ellis was there and said, all right, he did not care who he made the deed to. I executed the deed and it was by their request—Henry E. Bidwell and A. S. Ellis' request; left it in the Johnson county bank until Henry E. Bidwell should pay off this claim, whatever balance that was due, and then the deed was to be delivered. Otto was not present.

N. F. Hitchcock testified: I am a defendant and proprietor of the Johnson county bank. At the time Bidwell purchased this property, I held a mortgage on it for \$960, which Bidwell assumed. Shortly after the purchase of this property from Ellis, the deed was executed and papers brought into the bank by Ellis and Bidwell and left with me, with the instructions to deliver the deed to Mr. Bidwell when Bidwell paid the mortgage that was due, and also the \$1,800 for Mr. Ellis, the balance that was yet due Ellis. When I say Bidwell I mean Henry E.; the boy's name is Otto and the girl's name is Clara. Some time in May thereafter Mr. Bidwell paid, or I gave him credit as having paid, the \$960 mortgage, being the mortgage Bidwell assumed from Ellis to me.

Soon after, Ellis wrote for his money, and Bidwell came to me and said he was soon to ship his cattle, and asked me to pay Ellis what he required, as the cattle would be shipped in my name. I did pay Ellis, and delivered to Bidwell his deed and gave him a release of the mortgage he had assumed to the Johnson county bank. Upon receiving the returns of the cattle, I charged the amount so paid to Henry E. Bidwell, and retained the money from proceeds of cattle of Henry E. Bidwell.

The deed executed by Mary E. Bidwell, Henry E. Bidwell, Otto Bidwell, and Clara Bidwell to defendant Hitchcock for the real estate controversy is dated March 27th, 1885, and was filed for record March 30th of that year. On the trial of the cause the court below rendered a decree of foreclosure for the sum of \$985.28 in favor of the plaintiffs, and, subject to said decree, judgment in favor of Hitchcock for the premises in question.

The first question for determination is the validity of the note and mortgage executed by Otto Bidwell to Henry E. Bidwell.

It is apparent that Otto Bidwell paid nothing whatever for the property, and as against creditors of Henry E. Bidwell held it as a naked trustee. Henry E. Bidwell had the property placed in the name of his minor son. He then took a mortgage on such property from his son, and himself gave such mortgage as collateral security for the amount due the plaintiffs. The property in fact belonged to Henry E. Bidwell, though held by another, and a mere power to convey real estate is not regarded in law as a contract; therefore it is not necessary that the donee of the power should be capable of contracting. *Weisbrod v. The C. & N. W. Ry. Co.*, 18 Wis., 35. *McMurtry v. Brown*, 6 Neb., 368. Otto Bidwell being a mere trustee of the legal title to the property in question, could convey the same in execution of the trust, and, having done so, neither he nor his father can plead his infancy to invalidate the deed.

2. The name of the purported firm, it appears, was Bidwell & Brother, although, if the testimony of Henry E. Bidwell is to be believed, the firm consisted of his minor son and a daughter. Henry E. Bidwell transacted all the business, and evidently intended creditors to understand that himself and a brother not present constituted the firm. If he was acting merely as agent of his minor son and his daughter he should have so informed parties of whom he desired to purchase goods. Good faith and fair dealing require a party who does not intend to render himself personally liable by a purchase that he shall inform his vendor from whom he is purchasing. An agent is liable if he conceals his character as agent. *Franklyn v. Lamond*, 4 C. B., 637. *Evans v. Evans*, 3 A. & E., 132. *Thompson v. Davenport*, 9 B. & C., 78. *Owen v. Gooch*, 2 Esp., 567. *Raymond v. Pro. of C. & E. Mills*, 2 Met., 319. *Winsor v. Griggs*, 5 Cush., 210. *Tuintor v. Prendergast*, 3 Hill, 72. And the same rule prevails where he so conducts the business as to render his principal inaccessible or irresponsible. *Fenn v. Harrison*, 8 T. R., 761. *Savage v. Rix*, 9 N. H., 263. *Sydnor v. Hurd*, 8 Tex., 98. *Keener v. Harrod*, 2 Md., 63. These principles were applied to a member of an alleged corporation in *Abbott v. Omaha Smelting Co.*, 4 Neb., 416. Henry E. Bidwell, therefore, in failing to disclose the names of his alleged principals, rendered himself personally liable for contracts made by him.

3. The priority of the mortgage over the deed to Hitchcock. The mortgage in question had been executed and recorded nearly a year before Mr. Hitchcock received his deed. The mortgage was still on record and unsatisfied. Of this the record contained full notice to all parties. Mr. Hitchcock claims that he had no notice of the assignment. This may be true, and still the plaintiffs' equities will be superior to his, and with the mortgage unsatisfied on the record he could not, as against innocent third parties, take the property divested of the lien.

4. We find no such duress in the execution of the deed as would justify a court in setting it aside.

5. That the purchase money of the house was derived from the estate of the wife. This may be so, but the court below must have found against the claim, and under the circumstances disclosed by the testimony we cannot say that the finding is erroneous. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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ABIJAH RICHARDSON, APPELLANT, v. IRA D. PRATT
ET AL., APPELLEES.

1. **School Lands: CONTRACT OF SALE: FORFEITURE: NOTICE**
One S. purchased certain school lands in 1869, paying one-tenth of the purchase price and interest to the following January. In 1870 he sold and assigned the receipt or certificate. The interest was paid on the land for the years 1870 and 1871. Default having been made in the payment of the interest for the years 1872, 1873, 1874, and 1875, the treasurer of Otoe county, in which the land is situated, caused a notice to be published in a newspaper of that county, setting forth the facts of such delinquency, and requiring the removal thereof by the fulfillment of the covenant, etc., within thirty days. *Held*, The purchaser being absent from the state, that such notice was sufficient. *State v. Scott*, 17 Neb., 686.
2. **—: FAILURE TO MAKE PAYMENTS OF INTEREST.** While the failure to pay the interest on school land contracts on the day it becomes due does not work a forfeiture of the contract, yet the law requires good faith on the part of the purchaser, and a failure to pay such interest within the time required by statute, after notice of such delinquency, will bar the rights of the party.

APPEAL from the district court of Otoe county. Tried below before HAYWARD, J.

Edwin F. Warren, for appellant.

D. T. Hayden, for appellees.

MAXWELL, CH. J.

The plaintiff filed his petition in the district court of Otoe county, wherein he alleges—

1. That on the 24th day of June, 1869, one G. R. Swallow purchased at a public sale of school lands of Otoe county, at the court-house in Nebraska City, the north-east quarter of the north-west quarter of sec. No. 36, tp. 8, r. 11 e., for the sum of \$320, and then paid to James Thorn, then treasurer of said county, on account of same, one-tenth of purchase price, to-wit, \$32; received duplicate certificates of purchase receipts therefor; that said Swallow thereupon made and delivered to said Thorn, as treasurer, his note for the remaining nine-tenths of purchase money, due in ten years thereafter, with interest at ten per cent per annum; that said Swallow paid said Thorn, as such treasurer, interest on said note for the years 1869, 1870, and 1871, amounting respectively to sum of \$14.80, \$28, and \$28, and took the treasurer's receipt therefor.

2. That subsequently said Swallow duly sold, endorsed, assigned, transferred, and set over to plaintiff said certificate of purchase, and all his right, title, and interest therein; that ever since the plaintiff has been and still is the owner and holder thereof; that said plaintiff is the owner in fee simple of the lands described in said certificates, subject to the claim of the state of Nebraska, for the unpaid purchase money and interest.

3. That on the 8th day of November, 1881, the defendant, Ira D. Pratt, took possession of said lands by virtue of an alleged or pretended lease thereof, purporting to be executed by the state of Nebraska through its agents, and now holds possession thereof thereunder; that plaintiff

has tendered to defendant, Duke W. Simpson, the treasurer of said county, payment in full of all arrearages of interest accrued on the said note, and requested said Simpson, as treasurer, to accept and receipt for the same; that said Simpson refuses so to do, alleging as a reason therefor that said lands have been subsequently leased by the state to defendant Pratt, and that he, as said treasurer, had no authority to accept and receipt for such payments.

Plaintiff in his petition tenders and offers to pay all sums due, and interest thereon, and tenders to Simpson as treasurer, and to Pratt, defendant, "full, complete, and perfect performance" of the provisions of law in that behalf enacted.

4. Plaintiff further alleges that no notice of any forfeiture of his said interest in said described lands, derived under said purchase, was ever given to said Swallow while he owned the certificates of sale, nor to plaintiff since he became owner thereof; nor have any proceedings whatever at law or otherwise ever been taken by any person to annul or cancel such purchase, or to determine, or to invalidate the title, right of possession, or interest of said Swallow, or of plaintiff therein; that Swallow's note has not been surrendered, but is still held by the state or its officers.

Plaintiff prays an accounting of amount due for principal and interest on said note and taxes, if any, due the state on account of said purchase and sale; that plaintiff be permitted to pay the same into court for the use of the proper persons or authorities; that Simpson, as treasurer, or his successor, be required to receive and receipt for the same; that plaintiff may be decreed to be the owner of said tract of land—the ne. $\frac{1}{4}$ of nw $\frac{1}{4}$, sec. 36, 8, 11, as against the claims of defendant Pratt, and all claiming under him; that the pretended lease held by Pratt, or other evidence of possession, be decreed void and of no effect as against plaintiff's title; that the same be removed as a cloud to plaintiff's title; that said Pratt be required to surrender

possession, and account for the rents and profits of the land since Nov. 8th, 1881, and for general relief and costs.

To this petition the defendant, Pratt, answered, admitting his lease of said land, and alleging that by the neglect and default of the plaintiff, and those under whom he claims, in failing to pay the interest on said note as it became due, he has forfeited his right to said land, as no part of said interest has been paid since 1871. The defendant also alleges that in the year 1875 the land, by reason of said default in payment of interest, was duly forfeited after due notice to the delinquent, and that thereafter the defendant obtained a lease of said land from the state, and entered into possession thereof, and has made valuable improvements thereon, in all of the value of \$800. The reply is a general denial.

On the trial of the cause the court below found the issues in favor of the defendant, and dismissed the action. The plaintiff appeals.

The testimony shows that one George R. Swallow purchased the land in controversy from the state in the year 1869, and paid thereon one-tenth of the purchase money; that he gave the state a note for the residue; that some time in the year 1870 Swallow sold and assigned his receipt or certificate to one Cheney, who testifies that, "I paid him the par value of the certificate—*i.e.*, what he had paid upon the same, with the accumulated interest at ten per cent." He also testifies that he sold the same to the plaintiff about the year 1876, and "received from him the face of the paper and one-half of the interest I had paid out." Whether Mr. Cheney knew at the time of the sale that an attempt had been made the year previous to cancel the certificate does not appear. He swears, however, he was not served with notice. The proof also shows that Swallow, at the time of the purchase, was a non-resident of the state, and that Cheney and the plaintiff are also non-residents; and that no interest has been paid on said contract of purchase since 1871.

Sec. 17 of the act then in force for the registry, control, and disposition of school lands (General Statutes, 994-995) provided that, "The lessee shall give his or her obligation and contract that the lease money shall be fully and promptly paid annually in advance (the first payment being completed to the first of January ensuing); that no waste shall be committed upon the land," etc.

Sec. 18 provides that, "In case of the violation of any of the covenants in the contract furnished by the lessee or purchaser—by the non-payment of moneys at the time specified in the contract, by the commission of waste upon the land, by removal of any improvements thereupon from the land without the consent of the commissioners—the county treasurer shall notify the lessee or purchaser of his or her delinquency, and require the removal thereof by the fulfillment of the covenant of the bond and contract; and if such delinquency is not removed within thirty days the lessee or purchaser shall yield possession of the premises to the state of Nebraska, and the property shall thereupon immediately revert to and be re-vested in the state; and the contract shall be dissolved, and the right of the lessee or purchaser, both legal and equitable, therein be absolutely determined."

In 1875, as the interest had been in default for four years, and the residence of the purchaser or person claiming under him apparently unknown, a notice was published in one of the newspapers of Otoe county as follows:

"DELINQUENT LIST OF SCHOOL LANDS.

| DESCRIP. | SEC. | T'WN. | RANGE. | DATE OF SALE. | TO WHOM. |
|-------------------------------------|------|-------|--------|---------------|---------------|
| NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ | 36 | 8 | 11 | June 25, '69 | G. R. Swallow |

"To all parties hereinabove named:

"You will take notice that unless payment shall be made on or before the fifth day of June, AD. 1875, of the inter-

est now due on a certain school land contract, bearing date as above stated, executed by James Thorn, then treasurer of Otoe county, to you, for the sale of all those pieces or parcels of common school land situated in Otoe county, Nebraska, described as above, east of the 6th principal meridian, according to the government survey, of which you are the owners, the said contract shall be dissolved, and said property shall thereupon revert to and be vested in the state of Nebraska, and your right, title, and interest therein will be absolutely terminated. Dated this 6th day of May, A.D. 1875, at the county treasurer's office, Otoe county, Nebraska.

“R. H. MILLER,

“*Treasurer Otoe County, Nebraska.*”

The principal question presented for the determination of the court is, whether or not such notice is sufficient. The affidavit of the printer shows that it was published for thirty days, and that the person claiming the land was required to pay on the thirtieth day after the first publication of the notice, and on the last day on which the notice was in fact published. And it is claimed that even if a notice by publication was authorized, yet that the purchaser or those claiming under him was entitled to thirty days after the completion of the publication in which to comply with its requirements. It is a sufficient answer to this objection to say that the statute does not require a publication of the notice for thirty days. One publication will fill the requirements of the law, and any additional publications are for the benefit of the purchaser. The statute merely requires notice to be given to the delinquent; but how the notice is to be given is not expressly provided. A personal notice is not required, although that is the most satisfactory, and should be given when the residence of the delinquent is known. In many cases, however, the residence of the several purchasers, when they do not reside on the land purchased, is unknown. This, no doubt, was

considered by the legislature; hence it was not required that notice be personally served, or sent to the residence of the delinquent, or that it be personal in any form, but simply that the treasurer "shall notify the party of his delinquency, and require the removal thereof by the fulfillment of the bond and contract."

In a number of cases—such as the location of a public road—the statute does not require personal notice, even where the parties reside on the land over which the road may be located. And if the conditions on which the right to locate the road depend have been complied with, the property of the citizen may be condemned and appropriated to public use without personal notice of any kind to the owner. There are a number of other cases in which property rights are affected where personal notice to the land owner is not required, which need not be referred to here. A purchaser of school lands is required to pay one-tenth of the principal at the time of purchase, and interest to the 1st day of January following the purchase, and thereafter the interest annually in advance. These are statutory requirements, hence a part of the contract, the conditions of which every purchaser accepts. The interest is necessary each year for the support of the common schools of the state, and can be used only for that purpose. If one person with impunity may refuse to pay the interest due for one year, every other purchaser may invoke the same rule and refuse to pay the amount due, and thus close up the common schools of the state, and defeat the purpose of the grant. But such is not the law. It requires reasonable diligence in the payment of the interest due, and does not encourage or approve of laxity in making such payments. But it does not provide that in case of failure to pay at the day that the estate of the purchaser shall cease. From sickness and various other causes the purchaser may be unable to obtain the amount required for interest at the time required, hence the law, out of

tenderness for his rights, requires notice to be given of such delinquency, and a reasonable opportunity given him to remove the delinquency. But if the notice is not complied with within the time required by statute, the land will revert to the state, to be by it sold or leased to some one who will annually pay the interest or rent thereon, in order that the money thus derived may be used in the support of common schools; it was never intended by the legislature that a purchaser of school lands should be permitted to lie by for years to ascertain whether the purchase would be a profitable one or not; and if profitable, insist on a performance of the contract; if not, then abandon it. He must act in good faith, and use reasonable diligence in making payments of interest. If he fails to do so his rights in the premises may be determined upon notice as provided in the statute.

The question here presented was before this court in *State v. Scott*, 17 Neb., 686, to terminate a lease, and it was held that notice by publication was sufficient. We adhere to that decision, and it is decisive in this case. The rights of the plaintiff and all persons under whom he claims, were barred by the failure to comply with the terms of the notice of 1875, and since the year last mentioned neither he nor they have had any interest in said land. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

ART ELIZA ALEXANDER, PLAINTIFF AND APPELLANT,
V. JANE Y. IRWIN, DEFENDANT AND APPELLEE.

1. **Practice in Supreme Court: ABSTRACTS.** The act of 1885, requiring abstracts of cases in the supreme court to be made, requires such abstracts to be so made as to set forth so much of the case as is necessary to a full understanding of all questions presented to the court for decision, and, so far as the examination of the case by the court is concerned, is to take the place of the transcript and bill of exceptions. The court does not look beyond the abstract. All parts of the cause omitted therefrom are treated as not in the case. *Ballard v. Cheney*, 19 Neb., 58.
2. **Presumption.** All presumptions are in favor of the regularity of the proceedings of the district court. Error is never presumed.

APPEAL from the district court of Otoe county. Heard below before POUND, J.

Charles W. Seymour, for appellant.

J. R. Webster, for appellee.

REESE, J.

This action was instituted in the district court of Otoe county for the purpose of quieting plaintiff's title to the real estate described in her petition, or in case the court should hold the title to be invalid, then for the foreclosure of plaintiff's lien for the taxes paid under purchase for the years 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, and 1880. The cause was tried and decree rendered on the 23d day of April, 1886, by which decree it was adjudged that plaintiff's title had failed and his lien for the taxes of all the years mentioned, except 1861, 1862, 1863, 1865, 1867, 1868, 1869, and 1870 was foreclosed and the land ordered to be sold to satisfy the amount due, which was \$868 05. This sum was paid into court by defendant,

Alexander v. Irwin.

and plaintiff appeals from that part of the decree which finds the taxes for the years last named to be void. Defendant also appeals from the decree against her, but as she has paid the amount found due, and thus satisfied the decree to that extent, no further notice need be taken of the decree in so far as it was in favor of plaintiff.

Plaintiff's abstract of the record furnishes a fair synopsis of the pleadings and decree, but no light is given as to the testimony before the district court. We are therefore unable to say upon what ground the court found the taxes, alleged to have been paid, to be void. There is no proof before us that any taxes were ever levied or collected for the years mentioned, or that any assessment was ever made. It is the plaintiff who complains of the decision, and upon her lies the burden to show that the decision should have been different. In order to do this it was necessary to furnish an abstract of the testimony, as it is to that we must look. *Ballard v. Cheney*, 19 Neb., 58. In that case it was held that, "The act of 1885 requiring abstracts of cases in the supreme court to be made, requires such abstracts to be so made as to set forth so much of the case as is necessary to a full understanding of all questions presented to the court for decision, and so far as the examination of the case by the court is concerned, is to take the place of the transcript and bill of exceptions. The court does not look beyond the abstract. All parts of the cause omitted therefrom are treated as not in the case."

Every presumption is in favor of the regularity of the proceedings in the trial court, and that the finding and decree are sustained by the evidence.

The decree of the district court is therefore affirmed.

DECREE AFFIRMED.

The other judges concur.

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| 22 | 77 |
| 20 | 206 |
| 26 | 406 |
| 20 | 206 |
| 44 | 608 |
| 20 | 206 |
| 48 | 721 |
| 20 | 206 |
| 60 | 700 |

LUKE LAVENDER, APPELLANT, V. HENRY ATKINS ET
AL., APPELLEES.

Attorneys: FEES: SETTLEMENT OF CASE BY PARTIES. Where, in an action for the recovery of the title to real estate, the plaintiff and his attorneys enter into a contract by which the attorneys are to receive as their compensation a part of the property recovered in the action, and the plaintiff, pending the litigation, settles the case with defendants to his satisfaction—there being no attorney's lien for fees, it was *Held*, That the attorneys could not intervene to continue the suit by virtue alone of their contract with their client.

APPEAL from the district court of Lancaster county.
Heard below before MITCHELL, J.

Lamb, Ricketts & Wilson and *J. R. Webster*, for appellant.

D. G. Courtney and *O. P. Mason*, for appellees.

REESE, J.

The original action in this cause was instituted in the district court. The purpose of the suit was to set aside certain sheriff's sales and deeds to the lands described, which were alleged to be fraudulent. Upon a trial to the district court, a decree was rendered adverse to plaintiff in part, and from which he appealed. Defendants not being satisfied with a part of the decree, also took steps to appeal. Pending these proceedings, Lavender and defendants, on the 18th day of December, 1885, amicably adjusted their differences and settled the case. The stipulation of settlement was filed on the 21st day of the same month. December 26th the appellants here notified defendants that on the 28th they would apply to the district court for leave to intervene, and file a supplemental peti-

tion as plaintiffs, and prosecute the action on behalf of themselves for the protection of their rights as attorneys of Lavender, under a contract made with him on the 18th day of March, 1884, and filed for record December 21, 1885. This contract provided that in case of success the attorneys were to have a certain portion of the real estate recovered. The application of the intervenors was refused and final judgment entered according to the stipulation of settlement. From this refusal and judgment the attorneys appeal to this court. Defendants now move to dismiss this appeal for the reason that the cause is settled as between the parties to the action, and the judgment or decree cannot be reviewed upon the application of the attorneys.

The briefs of counsel seem to discuss not so much the motion to dismiss, as the merits of the case upon the appeal, and we are inclined to pursue the same course. It must be conceded that any person against whom a final order is made may prosecute error or appeal for the purpose of reviewing that order, and in so far as the *right* to appeal so as to obtain a review of the last judgment of the district court is concerned, it must be conceded to exist, and to that extent the motion cannot be sustained. But it is also clear that the action of the district court in its last or final order was right, and will have to be sustained.

What the rights of counsel may be in the case, it is not necessary here to discuss. It is only necessary to say that, Lavender and defendants having settled their dispute, the *case* is at an end and the litigation in that suit cannot be continued. It is true that plaintiff's attorneys had a contract with him which had the suit been carried to its ultimate results, might have been of an advantageous character to them, but they cannot litigate their rights in this action. If that contract gave them any rights as against defendants, it must be enforced in the proper suit. They cannot prosecute this appeal. No question of attorney's

lien arises. No effort was made to comply with the provisions of the statute conferring such lien. Whatever rights Lavender's attorneys may have against defendants, if any, arise solely upon their contract, and cannot be litigated in this proceeding.

It therefore follows that the motion to dismiss must be sustained, which is done, and the proceeding dismissed.

JUDGMENT ACCORDINGLY.

The other judges concur.

JOHN E. DIMMETT, PLAINTIFF IN ERROR, v. JOHN G. M.
APPLETON, DEFENDANT IN ERROR.

Forcible Entry and Detention: NOTICE TO QUIT. In action of forcible entry or detention of real property, the notice to quit should particularly describe the premises, the possession of which is desired; but substantial accuracy is all that is required. Hence, where the occupancy of a tenant covered and included all of the real estate described in the notice, a part of one story of the building being held by others, such notice was *Held*, sufficient.

Error to the district court for Otoe county. Tried below before HAYWARD, J.

John C. Watson and Charles W. Seymour, for plaintiff in error, cited: *Nason v. Best*, 17 Kan., 408. *Grant v. Marshall*, 12 Neb., 488.

S. H. Calhoun, for defendant in error, cited: *Sedgwick & Wait*, Trial of Little, §§ 401-403. *Wade on Notice*, §§ 636-638. *Miller v. Hurford*, 13 Neb., 23.

REESE, J.

This was an action of forcible detention of real property. The suit was commenced before a justice of the peace, where judgment was rendered in favor of the defendant in error, who was plaintiff in the action. Plaintiff in error, defendant there, appealed to the district court, where the cause was tried to a jury, who also returned a verdict in favor of defendant in error, and upon which a judgment was rendered. Plaintiff in error now seeks a review by proceedings in error.

The one controlling question in the case is as to the sufficiency of the notice to quit which was served upon plaintiff in error prior to the commencement of the suit before the justice of the peace. It is as follows:

"To John Dimmett:

"SIR—You are hereby notified to quit the following described premises, to-wit: Lots seven (7) and eight (8), in block ten (10), as designated in the recorded plat of Nebraska City, Otoe county, Nebraska, and to surrender the possession thereof within three days of the service of this notice, under penalty of the law.

"Nebraska City, Neb., June 11, 1885.

"J. G. M. APPLETON.

"By S. H. CALHOUN, *Attorney.*"

The admission of the notice in evidence was objected to by plaintiff in error, the objection being "because it does not particularly or sufficiently or specifically describe the premises the possession of which is sought to be recovered, and is incompetent, immaterial, and irrelevant," etc. The objection was overruled and the notice admitted.

The testimony showed that the property the possession of which was sought was a hotel known as the Grand Central hotel, consisting of the two upper stories of the

building on said lots, and the stairway and back yards, etc., appertaining thereto. Or, in other words, the whole building situated on the two lots, with all yards, cisterns, wells, etc., except four stores which are on the first or ground floor, and under a part of the hotel proper—one of them extending back the whole depth of the building, the others not. These store rooms were occupied by other parties, tenants of defendant in error, and not leased by plaintiff in error. That part of the objection relied upon is, that the notice did not particularly and specifically describe the premises in dispute, in that it did not specify that possession was required of the hotel property—or, rather, that part used as such—excluding the four stores referred to.

In support of this objection, *Grant v. Marshall*, 12 Neb., 488, is cited, and to some extent relied upon. We are satisfied with the rule laid down in that case and approve what is there said, but we do not think that the holding of the district court is in conflict with it. In that case the property in dispute was described in the notice as a certain lot in the city of Lincoln, while in fact the tenant occupied only one room in the basement of what was known as "Union Block" thereon, in which were rooms rented for offices, etc., occupied by various persons; the occupancy of the tenant being confined to the one room. The court very properly held that the notice was deficient and that it should contain a specific description of the premises.

In the case at bar the property occupied by plaintiff in error consisted of the whole of the surface of the two lots; as well the whole area covered by the building, as all of that part upon which the building did not stand, and which was used in connection with the hotel, excepting that part of one story which was used as stores.

While accuracy in the description of property in the notice is required, yet, as in all cases of the kind requiring notice, what is required is substantial and not technical accuracy, the law will not regard mistakes which do

not tend to mislead the party notified. Wade on Notice, sec. 638. *King v. Connolly*. 44 Cal., 236. *Congdon v. Brown*, 7 R. I., 19. Taylor's Landlord and Tenant, sec. 483.

There was no part of the property described in the notice over which plaintiff in error did not in part hold possession. He occupied it all. This occupancy was not to the exclusion of others to certain parts of one of the stories of the building, but it was to the exclusion of all in the other stories. It would have been more definite, perhaps, and confessedly more skillful, in the writer of the notice, to have described the property, as in the petition, as that portion of the building known as the Grand Central Hotel, etc., including all of the lots, but such description was not essential to the validity of the notice.

Other objections are suggested in the brief of plaintiff in error, but as they are not and could not be relied upon, they need not be referred to.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED

The other judges concur.

BENJAMIN H. BARTLING, PLAINTIFF IN ERROR, v. J. H. BEHREND, DEFENDANT IN ERROR.

1. Evidence examined, and found to sustain the verdict.
2. Instructions to Jury. It is proper for a trial court to instruct a jury as to the law applicable to all theories of a case on trial, leaving the jury to find the facts and to apply the law to the facts found.
3. ———. The instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient.
4. ———. Instructions examined, and found to be correct and applicable to the case at bar.

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| 22 | 607 |
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| 40 | 135 |
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| 42 | 137 |
| 43 | 410 |
| 20 | 211 |
| 52 | 76 |

ERROR to the district court for Otoe county. Tried below before HAYWARD, J.

Frank T. Ransom, for plaintiff in error, cited: *Horton v. Green*, 66 North Carolina, 596. *Tewkesbury v. Bennett*, 31 Iowa, 83. *Baker v. Henderson*, 24 Wis., 509.

John C. Watson and *Thomas B. Stevenson*, for defendant in error.

REESE, J.

This action was on a promissory note executed by defendant to plaintiff. The answer of defendant admitted the execution of the note sued on, but alleged as a defense thereto that the note was given for the purchase price of a self-binder harvester, sold by plaintiff to defendant, and that the harvester was sold with a warranty as to its quality, which was broken, and that the harvester was worthless, and returned to plaintiff. The reply admits that the consideration of the note was the purchase of the harvester, but denies the other allegations of the answer. There was a jury trial, which resulted in a verdict and judgment for defendant. Plaintiff alleges error, and brings the cause to this court for review.

The first contention of plaintiff in error is that the verdict is not sustained by sufficient evidence. We have carefully examined the testimony, and cannot so hold. There is a sharp conflict in the testimony, each side, of course, contending for and seeking to establish a condition of things which would insure a verdict in the direction sought. While, were the question submitted to us in the first instance, we might, and probably would, have decided otherwise; yet the jury to whom the questions of fact were submitted have been convinced that the theory of fact contended for and testified to by defendant and his witnesses

was the correct one. The defendant testified clearly to the warranty, and that the harvester did not comply therewith. As to the warranty he is in part corroborated by his wife, who was present, and who testified that plaintiff told them that the harvester "would give satisfaction in all things." As to the failure of the machine to do the work required of it, he is corroborated by the witnesses Haye, Koop, Willman, Blair, and Brady. All testified with more or less directness to the failure of the harvester when tried in the field.

The machine was bought in 1883. The notes were executed in the fall of that year—after the harvesting season—and the machine was not returned until July 1885—about harvest time. These facts, unexplained, are inconsistent with the idea of good faith on the part of defendant, but his explanation was submitted to the jury and they found it sufficient. This was that the season of 1883 was a wet one, and such a trial could not be made as was satisfactory to plaintiff, and at his request it was retained for trial another year. That the notes were given with the express understanding that they were to be held subject to such trial, and that in the harvest of 1884 the harvester failed to perform, and due notice was given to plaintiff, but that at plaintiff's suggestion defendant did not return it and new trials were made, a new binder attachment provided, and additional trials made, until defendant took another machine and cut the grain. If the jury believed the testimony of defendant and his witnesses—which they seem to have done—they were justified in finding as they did.

It is objected that there was error in the instructions given to the jury by the court. The fourth paragraph was as follows: "Simply because the machine failed to give satisfaction to the defendant does not relieve him from the payment of the note; it devolves upon him to show that the machine was a failure as a binder, and did not do good work, and that when he learned that the machine failed to

do good work he notified the plaintiff of such fact, and returned, or offered to return, the machine to plaintiff; and if he retained the machine, making no complaint and no offers to return the machine, but kept using it without complaint for two or three seasons, it would then be too late to complain or to return the machine, and in such case he should pay the note sued on."

It is said that "the effect of this instruction is that defendant would be liable on the ground that he made no complaint. If he kept the machine season after season and used it; cut his grain and harvested his crop with it; if he made complaint that was all that was necessary," etc.

We cannot see that this instruction is subject to the criticism made. The jury are squarely told that the mere failure of the machine to give satisfaction to the defendant would not relieve him from liability, but that he must go further, and show that the machine was a failure as a binder, that it did not do good work, and that he notified plaintiff of the fact, and that he returned, or offered to return, the machine. This is followed by the statement in substance, that if he retained the machine, made no complaint nor offers to return it, and used it for two or three seasons (as contended for by plaintiff) he must pay the note.

Paragraph three is objected to on undoubtedly the same grounds. It is as follows:

"If you find from the evidence that defendant, Behrends, took and used the machine and retained it for three seasons, making no complaints of the machine to Bartling, you have a right to presume that he was satisfied with and intended to keep the machine, and if you so find, you will return a verdict for the plaintiff."

It is entirely competent for a trial court to instruct a jury upon the law bearing upon the theory of each party to the suit. This instruction contains the elements of plaintiff's theory of the case, and the jury are told that if

they find with him on the facts, this verdict should be in his favor. This was right.

Plaintiff further contends that "the fifth paragraph of the court's charge to the jury says to the jury that the plaintiff sold the machine with a warranty, or accompanied the sale with representations or statements that amounted to a warranty." This instruction is as follows:

"Before you can find against the plaintiff you must find from the evidence that the machine sold defendant was not a good machine, would not do good work, and as a binder was a failure, and was not such a machine as Bartling told Behrends he was selling him."

This criticism would have weight, perhaps, were it not for the fact that in the third instruction the court charged the jury expressly, that before they could find for defendant they must find that the machine "was sold with a warranty, and that it was not such a machine as it was warranted to be." Other instructions were given which, to our minds, fairly presented the case to the jury. They should be construed together, and if upon the whole the law is correctly stated, it will be sufficient.

We perceive no error for which the judgment of the district court should be reversed. It is therefore affirmed.

JUDGMENT AFFIRMED.

The other judges concur.

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| 42 | 463 |

A. E. ALEXANDER, PLAINTIFF IN ERROR, V. O. H. GOODWIN AND JACOB LE FEVER, DEFENDANTS IN ERROR..

1. **Power of Attorney.** The power of attorney copied at length in the opinion, *Held*, To be sufficient authority for the execution of the deed, also copied in the opinion.
2. **Deed: SUFFICIENCY: TAXES: REDEMPTION.** The above-mentioned deed was sufficient to vest in the grantee therein named all the rights of the grantor to the money paid for the real estate therein described at tax sale, and the several amounts paid by such purchaser, for taxes subsequently assessed thereon; and the right to reclaim the same from such real estate, upon the failure of the tax title thereto.

ERROR to the district court for Cass county. Tried before MITCHELL, J.

S. P. Vanatta, for plaintiff in error.

M. A. Hartigan, for defendant in error Goodwin.

1. The construction and interpretation of a power of attorney is strictly confined to the express authority given therein. *Martindale's Conveyancing*, sec. 235. *Brantley v. Southern Ins. Co.*, 53 Alabama, 554. *Force v. Dutcher*, 18 New Jersey Equity, 401.

2. The certificate of purchase or payment of tax in itself conveyed no estate. *Cooley's Taxation*, ed. 1879, pp. 352, 853, and 454. *Tilson v. Thompson*, 10 Pickering, 359. *Alexander v. Bush*, 46 Pa. St., 62. *Hightower v. Freedle*, 5 Sneed, 312. *Stephens v. Holmes*, 26 Ark., 48. *Brackett v. Gilmore*, 15 Minn., 190. *Williams v. Heath*, 22 Iowa, 519. *Annan v. Baker*, 49 N. H., 161.

3. The deed being executed without a seal of the treasurer was void, the statute requiring it. *Sutton v. Stone*, 4 Neb., 319, 323. *Reed v. Merriam*, 15 Neb., 323, 325.

Sam. M. Chapman, for defendant in error *Le Fever*, cited: *Denning v. Smith*, 3 Johns. Ch., 344.

COBB, J.

It appears from the abstract that on the 4th day of September, 1871, one S. N. Merriam purchased from the treasurer of Cass county, at tax sale, the south-east quarter of section 24, in township 12, range 12, in said county, sold by said treasurer for the delinquent taxes thereon for the year 1870, the said purchaser paying therefor the sum of \$33.55, and receiving a certificate of purchase of said land for said delinquent taxes in due form. That said Merriam afterwards paid to the treasurer of said county subsequent taxes assessed and levied on said land at the times and in the amounts as follows, to-wit: On May 22, 1873, for taxes of 1872, \$38.58; on April 30, 1874, for taxes of 1873, \$33.48; on January 13, 1875, for taxes of 1874, \$51.36; on February 5, 1876, for taxes of 1875, \$31.32; on January 6, 1877, for the taxes of 1876, \$24.32; and on January 8, 1878, for taxes of 1877, \$28.58.

It further appears that said land not having been redeemed from the said tax sale, the same was, on the 5th day of September, 1873, by the treasurer of said county, conveyed to said Merriam, by a treasurer's tax deed of that date, which was duly recorded in said county on the same day.

It also appears that on the 20th day of August, 1884, the said S. N. Merriam, together with Lydia, his wife, for the expressed consideration of five hundred dollars, quit-claimed and conveyed by deed of that date, the said land to the plaintiff. This deed was executed by one W. D. Merriam as attorney in fact of the grantors. The power of attorney, by virtue of which said deed was executed, is copied in the abstract, is dated October 1, 1872, and by its terms empowered the said attorney "to bargain and sell

any and all real estate that we now own or may hereafter own in the state of Nebraska," etc.

It does not appear from the abstract who was the owner of the land at the date of said tax deed or other transactions. But it appears that on the 1st day of May, 1879, defendant Jacob LeFever received and recorded a deed of conveyance therefor executed by the sheriff of Cass county, and that on the 11th March, 1881, the said Jacob LeFever executed and delivered to the defendant, O. H. Goodwin a title bond of, to, and upon the said land and placed him in the possession thereof, and that said land was, at the date of the commencement of this action, in the actual possession and occupancy of said Goodwin under the said title bond.

This action was brought in the nature of an action *quia timet* for the purpose of removing from the said land the clouds cast upon the title thereof by the said sheriff's deed to LeFever and title bond from LeFever to Goodwin, or in case the title of the said plaintiff to the said land by and through the said tax deed should fail, then that the said plaintiff should be decreed to have a lien upon the said land for the amount for which the same was bid off and purchased at the said tax sale by the said S. N. Merriam, and the several amounts subsequently paid by him for delinquent taxes thereon, with interest on said several sums, as provided by statute, and that said land might be sold if necessary for the purpose of discharging such lien.

The defendant answered the petition of the plaintiff, admitting the possession of said land by them, as charged in the said petition, and claiming the title thereto. Denying the validity and lawfulness of the purchase of said land at tax sale by the said Merriam. Denying that the said Merriam ever paid the several amounts set forth in the petition, either as delinquent taxes or as taxes due, and a legal charge on said land; and denying that the plaintiff has any interest in said land under the pretended conveyance from S. N. Merriam, etc.

Alexander v. Goodwin.

There was a trial to the court, which found for the defendants and rendered a decree dismissing said cause with costs. The plaintiff brings the cause to this court on error, It appears from the bill of exceptions that upon the trial :

Plaintiff offered the treasurer's deed set forth in the petition as evidence of title.

Defendant objected to the introduction of said deed, because it was not executed as required by law, and had no seal attached.

Which objection was sustained by the court, and the court then found that the title under said deed had failed.

Plaintiff then offered satisfactory evidence of the sale of said land for the delinquent taxes of 1870, and of the purchase of the same by S. N. Merriam, and of the execution and delivery of the deed, and of the payment of the subsequent taxes as set forth in the petition for the purpose of establishing the lien for taxes, and having the same foreclosed, which evidence was received by the court.

Plaintiff then offered in evidence the power of attorney from S. N. Merriam and Lydia Merriam to W. D. Merriam, which is as follows :

We, the undersigned, hereby constitute and appoint W. D. Merriam our true and lawful attorney for us, and in our names, place and stead, to bargain and sell any and all real estate that we now or may hereafter own in the state of Nebraska, and in our own names to execute deeds therefor, hereby ratifying and confirming all that our said attorney may do by virtue hereof.

Done this first day of October, A. D. 1872.

SHELDON N. MERRIAM.

LYDIA MERRIAM.

Signed, sealed and acknowledged in presence of

ALBERT CHANDLER,

JULIA A. WARD.

[And properly acknowledged.]

To the introduction of which the defendants objected for the reason that said power of attorney is irrelevant and immaterial, for the reason that it appears from the face of the same that it authorized said W. D. Merriam to sell and convey *real estate* only, and in no manner authorized the transfer of the cause of action sought to be enforced in this suit against the real estate of the defendants. Which objection the court sustained and plaintiff excepted.

Plaintiff then offered in evidence the deed of S. N. Merriam and Lydia Merriam, executed under the foregoing power of attorney, which is as follows:

QUIT-CLAIM DEED.

For the consideration of five hundred dollars we, S. N. Merriam and Lydia Merriam, husband and wife, of Washington county, Ohio, do hereby quit claim and convey to A. E. Alexander the following real estate situated in the county of Cass and state of Nebraska, to-wit: The south-east fourth of section 24, township 12, of range 12.

Signed this 20th day of August, A.D. 1884.

S. N. MERRIAM,
LYDIA MERRIAM.

By W. D. Merriam, their attorney in fact.

In the presence of
G. D. Woodin.

[And properly acknowledged.]

To the introduction of which deed the defendants objected for the reason that it merely purports to be a release made by S. N. Merriam and Lydia Merriam by a party claiming to hold a power of attorney to convey real estate only, by one W. D. Merriam.

Which objection was sustained by the court, and the plaintiff excepted.

Numerous errors are assigned, but it is not deemed necessary to state them in detail.

Two questions are presented by the record.

1. Was the power of attorney from S. N. Merriam and Lydia, his wife, to W. D. Merriam, sufficient authority to the latter for the execution of the quit-claim deed to the plaintiff?

2. Did the quit-claim deed vest in the grantee therein named the right originally in the grantor to reclaim from the land the amount paid for its purchase at the tax sale as well as the several sums paid for delinquent taxes thereon, subsequent to the execution of the said tax deed and prior to the failure of the title conveyed thereby?

Both of these questions must be answered in the affirmative. As to the first proposition, it seems to be the position of counsel for defendant, Goodwin, that the object of the power being to authorize the conveyance of real property, and the trial court having found that the title to the land thereby sought to be conveyed had failed, the power was ineffectual to authorize the conveyance of even the claim or color of title created or existing in the grantor by virtue of the purchase of the land by the grantor at tax sale. This argument would be more plausible if the deed authorized by the power was a full covenant warranty; but even then, while admitting that it failed to carry a fee in the land, it would convey any right, easement, or lien thereon held or claimed by the grantor. But from the peculiar language of the power above copied, it may be doubted that it would authorize the execution of a conveyance with covenants of warranty. It cannot be doubted that it did authorize the execution of a deed conveying the right, title, interest, or lien of the persons executing the power in, to, or upon the tract of land therein described either in possession, expectancy, or *possibility*.

The second question is nearly, if not quite, involved in the first. S. N. Merriam purchased this tract of land at a sale for delinquent taxes; he received a deed therefor which purported to convey an absolute title to the land.

But long experience had shown it to be extremely difficult, if not impossible, to sustain a title to land acquired under proceeding for the collection of delinquent taxes. Recognizing this, the legislature passed the act of 1871. I quote the 7th section of said act as in more than one respect applicable to the question under consideration.

"SEC. 7. Whenever the title acquired by a purchaser of real estate at treasurer's sale shall fail, the purchaser at such sale, or his heirs or assigns, shall have a lien on the real estate so purchased for the full amount of the purchase money, together with interest thereon from the date of such purchase at the rate of forty per cent per annum, until the same is fully paid, and such purchaser, his heirs, or assigns, may pay all taxes lawfully assessed on such real estate after such purchase, and when the said title shall fail, may have a lien for all such taxes, together with interest thereon from the time of payment, at the rate aforesaid," etc. Gen. Stats., 936.

It will be observed that the lien above provided for attaches to the purchase, but lies dormant until the title acquired thereby fails, and it follows and attends such purchase whether in the hands of the purchaser, his heirs, or assigns. The original certificate of purchase is surrendered to the county upon the execution of the tax deed, so that it is no longer the subject of assignment. Accordingly the assigns provided for in the section must be the persons to whom the real estate has been conveyed or assigned by deed. So also of the subsequent taxes paid on the real estate by the holder of the tax title. The only evidence that he gets of such payment is a receipt from the county treasurer. Such receipt alone could scarcely be the subject of an assignment. It would be of no possible value in the hands of any assignee other than the holder of the title purchased at treasurer's sale; nor to him until such title fails. But upon such failure, in whosoever hands the title may be, he becomes the holder of a lien upon the land

Shamp v. Meyer.

for the amount of the original purchase, with interest, as well as for the amount of all legal subsequent taxes thereon, paid by the original purchaser or any assignee of such failing tax title, together with interest thereon. It has been settled by an unbroken line of cases in this court, beginning with that of *Pettit v. Black*, 8 Neb., 52, that the rate of interest to which the holder of the lien in cases of this character is entitled, is one per cent per month. That rule will be adhered to, and had plaintiff asked it in his petition in error or brief, a decree would be rendered for him in accordance with the above views in this court; but as he only asks for a reversal, the judgment of the district court is reversed and the cause remanded for future proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

JEROME SHAMP, PLAINTIFF IN ERROR, V. AUGUST
MEYER, DEFENDANT IN ERROR.

Contracts: ACTION: CONSIDERATION. Where one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise, though the consideration does not move directly from him.

Error to the district court for Lancaster county. Tried below before POUND, J.

A. J. Cornish and O. P. Mason, for plaintiff in error, cited: *Miliani v. Tognini*, 7 Pac. Rep., 279. *Lawrence v. Fox*, 20 N. Y., 268. *Vrooman v. Turner*, 69 N. Y., 280. *Garnsey v. Rodgers*, 47 N. Y., 233. *Cooper v. Foss*, 15 Neb., 520. *Stewart v. Snelling*, 15 Neb., 502.

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| 45 | 812 |
| 20 | 223 |
| 50 | 461 |
| 50 | 520 |
| 51 | 428 |
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| 57 | 171 |
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Bond v. Dolby, 17 Neb., 494. *Carman v. Kelly*, 5 Hun. (N. Y.), 283.

Sawyer & Snell, for defendant, cited: *Tweddle v. Atkinson*, 1 B. & S., 893. *Halsted v. Francis*, 81 Mich., 113. *Exchange Bank v. Rice*, 107 Mass., 37. *Anderson v. Fitzgerald*, 21 Fed. Rep., 294. *Clapp v. Lawton*, 31 Conn., 95. *Garnsey v. Rogers* 47 N. Y., 283. *Lake Ontario Shore R. R. v. Curtiss*, 80 N. Y., 223. *Austin v. Seligman et al*, 18 Fed. Rep., 519. *Dow v. Clark*, 7 Gray, 198. *Nat. Bank v. Grand Lodge*, 98 U. S., 123. *Merrill v. Green*, 55 N. Y., 270. *Pardee v. Treat*, 82 N. Y., 385. *Mackintosh v. Fatman*, 38 How. Pr., 145.

MAXWELL, CH. J.

This action was brought by the plaintiff against the defendant in the district court of Lancaster county. The defendant demurred to the petition; the demurrer was sustained and the action dismissed.

The plaintiff alleges in his petition in substance, that in November, 1880, the plaintiff, T. B. Dawson, and J. A. Wallingford constituted the firm of Dawson, Shamp & Company, doing business at Lincoln; that said firm was indebted to various persons and firms as follows: as guarantors upon the note of Peter Davy to the La Belle Wagon Company in the sum of \$95.96; to the R. Elwood Manufacturing Co. in the sum of \$157; to Hurst, Dunn & Co. in the sum of \$37.60; to the La Belle Wagon Co., as guarantors on the notes of one Henry Overstake, about the sum of \$287.50; to Saberling, Miller & Co. in about the sum of \$60, as guarantors upon the note of W. Larson; to the R. Elwood Manufacturing Co., about the sum of \$35, as guarantors upon the note of one L. W. Ward; to the La Belle Wagon Co., upon their own note in the sum of \$257.71, and \$57.71, and the sum of \$19 to the Perkins Plow Co. That afterwards, and on the 9th day

of November, 1880, the plaintiff sold all his interest in said partnership to one John Geisler, the firm of Dawson, Wallingford & Geisler assuming and agreeing to pay all of said debts, and save the plaintiff harmless. That in December, 1880, said Wallingford sold and transferred his interest in said firm to Dawson, Geisler, and one C. Nohring, in part consideration of which said three persons agreed to pay all the debts of said Dawson, Wallingford & Geisler, and save said Wallingford harmless; that afterwards Dawson sold and transferred all his interest in said partnership business, good-will and effects, to Nohring, Geisler, and the defendant, Meyer, in part consideration of which said persons assumed and agreed to pay and save said co-partnership harmless from all the debts and liabilities of said co-partnership of Dawson, Nohring & Co. And said persons continued in business as Nohring, Geisler & Meyer. That in March, 1882, said last-named firm was dissolved by the withdrawal therefrom of Geisler, and the transfer by him to Nohring & Meyer of all his interest in said firm, in part consideration whereof said Nohring & Meyer agreed to pay, and did assume all the indebtedness of Nohring, Geisler & Meyer. That in October, 1882, the firm of Nohring & Meyer was dissolved, the defendant receiving and retaining in severalty all the business, effects, and good-will of same last-named co-partnership, and, in part consideration thereof, assuming and agreeing to pay all the debts and liabilities of said last-named firm. But notwithstanding the premises, neither the said defendant, nor the said Dawson, nor Wallingford, nor Nohring, nor Geisler, nor either of said co-partnerships, have ever paid said indebtedness or any part thereof; that by reason of the premises said plaintiff has been compelled by the creditors of Dawson, Shamp & Co. to pay all of the debts above set forth, and neither said defendant nor any of said persons or co-partnerships have repaid to plaintiff said sums of money, or any part thereof.

● Shamp v. Meyer.

If the allegations of the petition are true, Meyer assumed the payment of the obligations of the firm of Nohring & Meyer, one of which was the payment of the debts which the plaintiff afterwards was compelled to pay. Can he maintain an action against Meyer on this contract to which he was not a party, but which contains a provision for his benefit?

This question was before the supreme court of Nevada in *Miliani v. Tognini*, 7 Pacific Rep., 279, and it was held that a party may maintain an action on a simple contract, to which he was not a party, upon which he was not consulted, and to which he did not assent, when it contains a provision for his benefit.

In *Lawrence v. Fox*, 20 N. Y., 268, one Holly, in November, 1857, at the request of the defendant, loaned and advanced to him \$300, stating at the time that he owed that sum to the plaintiff for money borrowed of him, and had agreed to pay it to him next day. That the defendant, in consideration thereof, at the time of receiving the money, promised to pay it to the plaintiff on the next day. The court held that the plaintiff could maintain an action on the promise. *Farley v. Cleaveland*, 4 Cow., 432, S. C., 9 Id., 639. This principle has been frequently applied in cases of mortgage foreclosure, where it is held that the undertaking of the grantee of mortgaged premises to pay off the incumbrance is a collateral security obtained by the mortgagor, which inures by an equitable subrogation to the benefit of the mortgagee. *King v. Whitely*, 10 Paige, 465. *Halsey v. Reed*, 9 Paige, 445. *Cumberland v. Codrington*, 3 Johns. Ch., 254-261.

In *Schermerhorn v. Vanderheyden*, 1 John., 139, it was held that a parol promise from one person to another for the benefit of a third person will enable that third person to maintain an action on such promise. This rule was established under the common law, and has been adhered to by the courts of that state.

In *Cooper v. Foss*, 15 Neb., 516, it was held that the purchaser of mortgaged premises, who, as the whole or part consideration for such purchase, agrees to pay off the mortgage, may be sued upon default of such payment by the holder of the mortgage. See also *Stewart v. Snelling*, 15 Neb., 502. *Merriman v. Moore*, 90 Penn. St., 80, *Carman v. Kelly*, 5 Hun., 283.

In *Merriman v. Moore* it is said: "It is a fundamental principle that a party may sue on a promise made on a sufficient consideration for his use and benefit, though it be made to another and not to himself. *Hoff's Appeal*, 24 Pa. St., 200. *Townsend v. Long*, 77 Pa. St., 143. *Justice v. Tallman*, 86 Pa. St., 147.

In *Putney v. Farnham*, 27 Wis., 187, it was held that in case of simple contract, where one makes a promise to another for the benefit of a third person, such third person may maintain an action upon the promise though the consideration does not move from him. This, we think, is a correct statement of the law, and it is decisive of this case, as the petition clearly shows a promise of the defendant made to another for the benefit of the plaintiff.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

THE CITY OF PLATTSMOUTH, PLAINTIFF IN ERROR, v.
THOMAS MITCHELL, DEFENDANT IN ERROR.

1. **Municipal Corporations: DEFECTIVE SIDEWALKS.** Before a city or other municipal corporation will be liable for injuries caused by a defective sidewalk, it must be shown that the city, by its officers, had notice of the defect, or that such defect had existed so long and under such circumstances as to raise the presumption of knowledge. But where a portion of a sidewalk is in bad condition by reason of loose boards and defective construction, it is not necessary that the city or its officers should have notice that the particular board which caused the injury was loose. Notice of the general bad condition of the walk at that place will be held sufficient.
2. **Negligence: CONTRIBUTORY NEGLIGENCE.** In an action for damages resulting from personal injuries caused by the alleged negligence of the defendant, the question of contributory negligence on the part of plaintiff is, ordinarily, one of fact for the jury to determine under instructions from the court.
3. **Municipal Corporation: SIDEWALKS CONSTRUCTED BY PROPERTY OWNER: LIABILITY OF CITY FOR INJURIES.** Where a sidewalk is constructed on a public street or thoroughfare in a city by an abutting property owner without any direction or order by the officers of such city, the fact of such construction by the property owner without authority will not relieve the city from liability for damages to persons injured thereon without fault, if after the construction of such walk the city assumes jurisdiction over it and orders repairs to be made prior to an accident.
4. ———: ———: ———. Nor will such city be relieved from liability, even though it does not assume such jurisdiction, if the walk is in a public street in constant use, and in a line of other sidewalks constructed by direction of the city, or over which it has control.

ERROR to the district court for Cass county. Tried below before MITCHELL, J.

Chapman & Polk, for plaintiff in error.

It is contributory negligence for a person passing along a street to go upon a part of it which he knows or per-

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ceives to be dangerous. *Evans v. Utica*, 69 N. Y., 166. *Belton v. Baxter*, 54 Id., 245. *Chicago v. McGiven*, 78 Ill., 347. *Coates v. Canaan*, 51 Vt., 131. *Wilson v. Charlestown*, 8 Allen, 137.

J. B. Strobe and Bryon Clark, for defendant in error.

There was no contributory negligence. It was a question for a jury to determine whether a party injured exercised due care. *Smith v. Lowell*, 6 Allen., 39. *Cuthbert v. Appleton*, 24 Wis., 383. *Rice v. Des Moines*, 40 Iowa, 642.

REESE, J.

This was an action against plaintiff in error for damages resulting from a personal injury to defendant in error, occasioned by a defective sidewalk on one of the streets of plaintiff in error. The verdict was in favor of defendant in error—plaintiff below—and the defendant city prosecutes error to this court.

The facts of the injury may be briefly stated as follows:

Defendant in error and another person were walking upon the sidewalk on which the accident occurred, when the individual accompanying him stepped on the end of a loose board, outside the underlying stringer. This elevated the end of the board in front of defendant in error, and he was thereby thrown down, receiving severe injuries by the fall. It is alleged in the petition, and was proven to the satisfaction of the jury, that the sidewalk in question was defective in its construction, had long been out of repair, and that the defect and want of repair were known to the officers of plaintiff in error. The testimony on these questions was conflicting, and as there was sufficient proof to sustain the finding against plaintiff in error, that part of the case, under the well established law of this state, cannot be molested. While it may be true that there was no

notice of the looseness of the particular plank which occasioned the injury, yet there was sufficient proof of notice of the bad condition of the sidewalk in general at the place where the accident occurred, the loose condition of the boards, and the defects in the construction of the walk, to meet all the requirements of notice of the defect which caused the injury. *City of Lincoln v. Woodward*, 19 Neb., 259. The contention, therefore, that "the defect in the sidewalk by which defendant in error received his injury was a latent defect," need not be further noticed.

It is next insisted "that defendant in error knew of this latent defect, and did not exercise that care and caution which, under the circumstances, he was compelled to exercise to enable him to recover damages from the city."

Upon examination of the instructions given to the jury by the trial court, we find that the question of contributory negligence was submitted to them, and they were directed that in case they found that the negligence of defendant in error contributed to the injury, he could not recover.

The jury were justified in finding from the evidence that the sidewalk on sixth street, in front of the Cottage House (the place where the accident occurred), had been defective for a number of months, and that there was scarcely a time when some of the cross boards were not loose. That both the city officers and defendant in error knew of this condition. That other persons had been thrown by the boards in much the same manner as defendant in error was thrown. That the accident occurred in the daytime, while all apparent defects might be seen, and that defendant in error was walking near one side of the sidewalk in company with his associate, using such care as people ordinarily use under such circumstances.

Among a number of other instructions, the following was given :

3d. Under ordinary circumstances, persons traveling on the streets by the usual modes are required to use ordi-

nary care only; and you should presume that plaintiff exercised such care, unless the evidence shows negligence or fault on his part. In determining whether there was negligence on his part which contributed to the injury received, and of which plaintiff complains, you have a right to consider his knowledge at the time of the unsafe condition of the sidewalk over which he was passing; for if he had such knowledge, the law would require of him more care than it would otherwise do. But it is for you to determine from the evidence and circumstances of the case whether he was guilty of contributory negligence, and if he was, he cannot recover.

This instruction fairly submitted the question of contributory negligence to the jury. It was for them to say, from all the evidence in the case bearing upon the conduct of defendant in error at and prior to the accident, whether he was negligent, and whether such negligence, if proven, contributed to the injury. It would be quite difficult to establish an inflexible rule by which we, as matter of law, could say whether the conduct of defendant in error was or was not negligent. If he knew the board upon which his associate was about to step was loose, or if he had good reason to believe such was the case, he would naturally hesitate till the danger was past, before crossing it. Yet he had the right, in the absence of such knowledge, to presume the walk was safe, and pass along in the natural and usual way and with the usual reliance of pedestrians in passing over a walk in the condition in which he knew this to be. Or, stating the proposition differently, he was not required to presume that each board in place was a trap, leave the walk, and walk in the street. His whole conduct was for the scrutiny of the jury, and it was for them to say whether or not he was negligent. They appear to have thought not, and by their conclusion we must abide.

The next and last contention of plaintiff in error is, that

it can in no event be held liable, as the sidewalk was constructed without its authority or direction, but by a private person, in front of his property, and that the city never at any time had control of it.

Upon this point it would be sufficient to say that there was some proof that the city did assume jurisdiction over the walk, and by its council ordered its officers to notify the owner to repair it. The chief of police, acting under instructions, notified the owner of the order of the council to repair the walk at one time, and assumed jurisdiction over this walk, the same as the other walks of the city. This was enough to fasten the liability of plaintiff in error.

But we do not think that proof of the assumption of this jurisdiction was at all necessary. The evidence shows, beyond any question, that the sidewalk where the accident occurred was in constant use, and had been for a long time—many years; and that, aside from the main business street of the city, it was on one of the most public thoroughfares. It is the duty of the city to see that all its public highways, in general use, are made and kept in a reasonably safe condition. It has authority to require the removal of obstructions, and in default of such removal, to punish the offender and remove the obstruction.

If the street, being a thoroughfare in general and constant use, is obstructed by a sidewalk for a series of years, which is an element of danger, it is clearly the duty of the city to cause the danger to be removed, and in case of a defective segment of sidewalk, on the line of travel over other walks, it would be equally as liable as if the walk had been constructed by its express order. *Luck v. City of Ripon*, 52 Wis., 196; 4 Waite's Ac. and Def., 536. *Oli-ver v. City*, 69 Mo., 83. *Weare v. Fitchburg*, 110 Mass., 334. *City of Bloomington v. Bay*, 42 Ill., 503. Dillon on Municipal Corporations, § 1017 *et seq.*

We have examined all the testimony and the instructions of the court, and find in the former sufficient to sus-

Marion v. State.

tain the findings of fact, and in the latter no misstatement of the law.

It follows that the judgment must be affirmed.

JUDGMENT AFFIRMED.

**JACKSON MARION, PLAINTIFF IN ERROR, v. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.**

1. **Criminal Law : TRIAL : COMPETENCY OF JUROR.** Where a person is called to act as a juror on the trial of a criminal cause, and upon examination it is made to appear that he has heard the testimony of a part of the witnesses in a previous trial of the same cause, and that he has formed an opinion as to the guilt or innocence of the party on trial, and that such opinion is founded upon the testimony heard, and is still retained by him, it is not error to excuse him.
2. ———: ———. **OPINION OF JUROR.** If a proposed juror has formed an opinion as to the guilt or innocence of a defendant upon whose trial the juror is called to sit, and that opinion is one which is so firmly fixed as to require evidence to remove it, it is not error for the court to excuse him from sitting in the cause.
3. ———: ———: **JUROR A RELATIVE OF ACCUSED.** If a proposed juror is "a relative within the fifth degree" to a defendant on trial for a criminal offense, it is a cause for challenge under section 468 of the civil code, and if a challenge for cause is interposed it should be sustained, and the juror excused.
4. ———: ———: **FORMER SERVICE AS JUROR.** By section 665 of the civil code all persons are exempt from service as jurors in the district court who have served in such court within two years, and such service being shown, it is sufficient cause to excuse a juror.
5. ———: ———: **CHALLENGE TO JURY.** Where, after a jury has been sworn to try a cause, and immediately after the administration of the oath, but before any other act is done or step taken in the trial, the accused by permission of the court challenges one of the jury, and the challenge is allowed, and another juror

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called against whom no objection exists, an objection to further proceeding with the case to the jury as selected was properly overruled. The error, if any, in allowing the challenge being at the instance and in favor of the defendant, he cannot complain. There would be no error in re-swearing the whole jury, and proceeding with the trial.

6. ———: CIRCUMSTANTIAL EVIDENCE: MOTIVE FOR THE CRIME. Where a defendant is on trial for the crime of murder, the evidence of which is circumstantial, it is competent to prove a conversation between the defendant and deceased concerning the purchase of property of accused by defendant just prior to their departure from home together and just prior to the alleged killing (and after which defendant reappeared alone and in possession of the property, the possession of which was to be retained by deceased until paid for) for the purpose of showing a motive for the killing; and this would be true even though the contract of purchase was reduced to writing, and put in the possession of deceased.
7. ———: EVIDENCE: PHOTOGRAPH. A photograph of deceased taken during life is competent evidence to aid in his identification.
8. ———: WITNESSES: CROSS-EXAMINATION. Where a witness, called by a defendant in his defense, is interrogated as to the conduct and presence of the accused up to about the time of the alleged commission of the crime, it is not improper cross-examination for the state's counsel to inquire as to his conduct and presence after that date without being limited to the exact time mentioned in the examination in chief.
9. ———: ———: IMPEACHING WITNESS. Where it is sought to impeach the testimony of a witness by showing a bad reputation for truth and veracity, the inquiry as to such reputation must be limited to the community in which the witness resides or has recently resided.
10. Instructions to Jury. A correct instruction given, or any instruction given on request of a defendant on trial, will not be held to be erroneous because an improper reason for the instruction is given. With the reason for the instruction the jury has nothing to do.
11. ———: QUESTION FOR JURY. If testimony is given from which a material fact may be inferred, it is the duty of the court to submit the question of such inference to the jury by proper instructions. And such instruction would not be open to the objection that the court gave undue prominence to that item of the testimony.

12. **Criminal Law: CIRCUMSTANTIAL EVIDENCE: LOCUS IN QUO.** It is proper for a jury, in a case depending upon circumstantial evidence, to consider all the circumstances and conditions proven and having any reference to, or bearing upon, the main issues in the case; and in such case, where the accused asked an instruction that in order to convict the state must prove beyond a reasonable doubt that the deceased died within a year and a day after receiving the injury; that the cause of death was inflicted by the accused, and that it was not sufficient for the state to prove the finding of the body of the deceased in the county in which the homicide was alleged to have been committed, but that it must be proved beyond a reasonable doubt that deceased was unlawfully killed, with malice aforethought, by the accused, it was *Held*, Proper for the court to add to the instruction the further charge that the place where the remains of the deceased was found, if found, might be taken into consideration, together with all the other evidence in fixing the locality of the homicide, if one was committed.
13. **Instructions to Jury.** If a proper instruction be once given it is not error for the court trying the cause to refuse to repeat it on request of the defendant.
14. ———. Instructions must be applicable to the evidence ad-
duced on the trial.
15. **Crimes Committed on Indian Reservation.** The courts of this state have jurisdiction and authority to try and punish persons for crimes committed on Indian reservations within the state.
16. **Constitutional Law: CHANGE IN CRIMINAL PROCEDURE.** A defendant on trial for a criminal offense has no vested right in the manner of procedure established by law at the time of the commission of the alleged crime. It is within the power of the legislature to change the procedure or manner of enforcing a punishment after the commission of the offense, and such a law would not be void as an *ex post facto* law. It was therefore *Held*, That, although the law in force at the time of the commission of the alleged offense provided that juries should be the judges of the law, but which law was repealed before the trial, it was competent for the legislature to make such change, and no error for the trial court to refuse to instruct the jury in the language of the prior law.
17. **Verdict examined and Held** to comply with the law.
18. **Motion for new trial** alleged facts and reasons therefor not shown by the record, and which were supported by affidavits.

Counter affidavits were filed in which all the allegations in the motion for a new trial were disproved. *Held*, That the decision thereon by the district court was correct.

ERROR to the district court for Gage county. Tried below before BROADY, J.

L. W. Colby and Hazlett & Bates, for plaintiff in error.

William Leese, attorney general, for the state.

REESE, J.

Plaintiff in error was indicted at the March term, 1883, of the district court for Gage county, for the crime of murder, committed on the 15th day of May, 1872. Upon trial he was convicted of murder in the first degree, and sentenced to be hanged. Upon a review of that judgment by this court, a new trial was granted. The case is reported in 16 Neb., 349. A re-trial resulted in the same judgment, and the case is again before us by proceedings in error.

We will notice the questions presented substantially in the order in which they occur in the brief of plaintiff in error.

A large number of men were examined on their *voir dire* before a sufficient number of competent jurors could be found, and it is alleged that the court erred in its rulings as to the competency of persons called to sit in the case as such jurors.

Mr. Dobbs, of the regular panel, was called. Upon enquiry by the district attorney, he stated that he had heard a part of the testimony on the previous trial, and from that he had formed an opinion as to the guilt or innocence of the accused, which he still had. He was challenged by the state and excused by the court, to which plaintiff excepted.

As the case stood at the time of the ruling of the court, there was no error in the decision. So far as the exami-

nation had gone, and assuming that plaintiff was satisfied with it, there being no examination on his part, the juror was properly excluded. As we shall hereafter notice, the "manner of procedure" in the prosecution of criminal cases is to conform to the law now in force, even though the crime was committed while the former criminal code was in force. Sec. 255, Crim. Code. By section 468 of the present code, it is enacted, that if a juror has formed or expressed an opinion as to the guilt or innocence of the accused, he shall be examined on oath as to the ground of his opinion, and if the opinion is not founded "upon conversations of witnesses of the transactions, or reading reports of their testimony, or hearing them testify," and the juror shall declare his ability to sit and decide impartially, he may be retained. The juror had heard the testimony (in part) on the previous trial, and upon that his opinion was founded. This was enough to justify the trial court in excusing him.

Mr. Mitchell was examined as to his competency. He stated that he had formed an opinion as to the guilt or innocence of plaintiff, which it would take evidence to remove. Plaintiff made no examination. Upon challenge by the state he was properly excused. *Olive v. The State*, 11 Neb., 1.

Mr. Wymore was called, and stated that he was a "first cousin" to plaintiff, and when asked by the court if he "could be a fair and impartial jurymen to sit in the trial of the cause," his answer was, "I don't know; I don't think I would." This would seem to be sufficient. He was a relative within the fourth degree. The statute excludes all within the fifth. Sec. 468, Crim. Code.

Mr. Allsworth being called as a talesman, claimed his exemption, having served on the regular panel of jurymen at the June term of court of the same year. He was excused. While a verdict rendered by such a juror would be legal, yet the juror was entitled to the exemp-

tion, and it was not error to allow it. Civil Code, sec. 665, Title Juries.

As to the jurors Reed, Morrison, and Jillett, the same rule would apply as to the juror Mitchell, above referred to. As to Mr. Moore, the same as to Mr. Dobbs, and as to Mr. Cain, the same as to Mr. Allsworth.

The peremptory challenges having been made, the jury were sworn to try the cause. Immediately after the administration of the oath, plaintiff in error challenged a member of the jury, Mr. Mathews, and the juror was excused. It matters not whether this ruling was right or wrong, as it was upon plaintiff's motion. Mr. Smith was then called as a talesman and examined as to his competency, both by the state and plaintiff in error. No objection having been made to him, the court ordered the jury to be re-sworn. Plaintiff in error then "objected to further proceedings in the case with the present jury; the jury having already been sworn and one juror excused." The objection was overruled and the jury re-sworn. We see no prejudicial error in this. While it may be that plaintiff could not, as a matter of right, have insisted upon the exclusion of Mr. Mathews, yet having done so successfully, and having waived all challenge of the new juror, and the trial not having been commenced, nor the statements made to the jury, we cannot see that he was in any degree prejudiced.

On the trial one Jacob Worley was called as a witness for the state. He testified that in 1872 he saw plaintiff in error and the deceased together in Kansas, and that they left that state, saying they were coming to Nebraska. That prior to their departure the deceased boarded with plaintiff in error. That plaintiff in error desired to purchase a team and harness owned by deceased, and finally did so, for \$225, paying \$30 in cash; and that on the day before their departure, plaintiff in error purchased a wagon of the deceased, agreeing to pay \$90 therefor, the witness having heard a conversation between them to that effect. That

he was present at the time the contract was made with reference to the team and harness, and both parties stated the terms of the whole transaction to him. On the cross-examination it was shown that the contract for the sale of the team—and perhaps the wagon—was reduced to writing, whereupon plaintiff in error moved to strike out all the testimony of the witness in regard to the trade, as immaterial, irrelevant, and not the best evidence. The motion was overruled, and this ruling is assigned for error. Upon re-direct examination it was shown that the writing was delivered to the deceased, and by him put in his pocket; and that they left there the next morning, and the witness had never since seen the written instrument, and knew nothing more concerning it. We think the ruling of the court was correct. Not so much upon the theory that the paper was shown to be lost—yet that was sufficient, perhaps, under the circumstances—but upon the ground that the testimony was competent without showing such loss.

Soon after the parties left Kansas, they appeared together in Gage county, this state, and from there they “went west,” to be gone, as stated by plaintiff in error, four or five weeks; the possession of the team and wagon being retained by deceased until they should be paid for. Soon after their departure from the house of the parents of the wife of plaintiff in error to go west, and within a few days, plaintiff in error returned without the deceased, saying he had gone to Clay county, Kansas, but having in his possession the team and wagon, and wearing a part of the clothing of deceased.

This will be sufficient to show the relevancy of the conversation between the parties so shortly before the alleged killing, and also show a motive on the part of plaintiff in error in taking the life of deceased—the evidence of the killing, and of plaintiff’s guilt being circumstantial—not for the purpose of proving the terms of the contract of

purchase, but to show the relations sustained by the parties, and the circumstances under which they left Kansas. It was competent to show, as a circumstance in the case, the desire on the part of the plaintiff in error to possess himself of the property, if for no other purpose. Maxwell Pl. and Pr., 519. 1 Greenleaf, § 89.

A general objection is made that on the trial the district attorney propounded to the witnesses a great many leading questions, and objections are also made specially to particular questions. It must be sufficient for us to say upon these objections, that upon examination of the bill of exceptions we find that in some instances leading questions were propounded to witnesses, but in nearly every instance objection was promptly made, and sustained by the court. So far as the general view of the case goes, the witnesses were reasonably fairly examined. We have also examined the questions to which our attention is specially called, and find no room for complaint.

The next question presented is, that the court erred in admitting "in evidence the photograph of John Cameron over the objection of counsel for defendant." This photograph does not accompany the bill of exceptions, but we find from the record that it was a likeness of the deceased, taken before his death. While it is true it might be of little or no service in the matter of the identification of the remains, yet it might be of importance in the matter of the identification of John Cameron, the person in the company of plaintiff in error immediately before his return to the home of the Warrens, and as a means of identifying Cameron, as the person testified to by the various witnesses in his lifetime. For this purpose it was admissible, though of no great importance. The same may be said of the hair found where the remains were first discovered; and though of but little importance, it would be a matter to submit to the jury as a circumstance tending to aid in the identification of the remains as those of John Cameron.

The next objection to the testimony is to the cross-examination of the witness J. D. Marion, who was a witness on behalf of plaintiff in error. This witness testified that he resided in Kansas, and had resided there since the year 1884; and that in 1872 he resided in Gage county, Nebraska. That he saw plaintiff in error and deceased together just before their departure, and also saw plaintiff in error a few days afterward on his return to the Warrens'. That he resided about two hundred yards from their house, was a brother of plaintiff in error, and acquainted with his clothing to some extent,—especially his boots—when he purchased them, etc., and also giving a description of the person of the deceased. The witness also testified as to the teams of plaintiff in error, stating that he had two which he claimed, and that deceased was working for him (plaintiff in error), and that when they left they said they were going away to work on the railroad. On cross-examination the witness was asked when he saw plaintiff in error next. The answer was, that it was some three or four days after he first came back. He was then asked how long it was until he saw him again, and whether during that time he knew of his whereabouts. These questions were objected to as incompetent, and not proper cross-examination. The objection was overruled, and the witness stated that he did not see him for ten years, and did not know where he was during that time. We see no error in the ruling of the court upon these objections. It seemed to be the purpose of counsel for plaintiff in error to limit the testimony of the witness to the conduct of plaintiff in error to a period ending with his departure from Warren's with the deceased, but we do not think that the cross-examination should for that reason be limited to that time. It was proper to enquire as to his conduct after as well as before that date. The fact that the witness knew nothing more of him for ten years, rendered any further examination on that point unnecessary. It is quite proba-

ble, though not so stated in plaintiff's brief, that the district attorney had another purpose; that of showing the disappearance of plaintiff in error soon after the commission of the alleged crime. The fact that this result might follow, would not render the examination improper, and if erroneous on that ground, it would be without prejudice, for this fact had been abundantly proven by other witnesses.

George Johnson was called as a witness for the purpose of impeaching the witnesses John and Rachel Warren. He was asked if he was acquainted with their reputation for truth and veracity, and what that reputation was. He testified that he was acquainted with them "ten or twelve years ago," but that for the last five or six years he did not know where they resided and knew nothing about them. The court properly excluded this testimony. The purpose of such testimony is to affect the credibility of the witness, and should be confined to about the time the testimony is given. The usual course is to confine the enquiry to the place or community in which the witness resides. This is not an inflexible rule, for it sometimes happens that the present residence of a witness has not been of sufficient length of time to establish a reputation, and when that fact is shown the inquiry may reach back to where he had just previously resided, but we know of no rule that would permit the time to be extended so far as desired in this case. 1 Greenleaf on Ev., § 461.

A number of objections are made to the action of the court in giving and refusing instructions.

Instruction numbered seventeen asked by plaintiff in error was as follows:

"The jury are further instructed that they cannot find the defendant guilty of any other crime or offense than the one charged in the indictment, nor of any lower or less degree of homicide than the one charged in the indictment, even though the same should be proven by competent evidence beyond a reasonable doubt, for the reason

that the same is barred by the statute of limitations." This instruction was changed by adding the following: "No, not for the reason that manslaughter is barred, but for the reason that the court remembers no evidence upon which to base an instruction on the subject of manslaughter. The court instructs that you can convict of no other offense than the crime charged."

Plaintiff in error insists that this change was prejudicial error. Why or how is not very clearly indicated. The instruction, in so far as any question of law is concerned, was given as asked. It was a matter of no concern to the jury what the reasons for giving the instruction were, and one with which they had nothing to do. Even though we concede that the reason for the instruction entertained by the court was wrong, that would not affect the instruction given. A bad reason for a good instruction, if it is not modified thereby, will not make the instruction itself bad. We do not understand why it was necessary for any reason to be given for the instruction, but whatever may have been the purpose, the instruction is not affected thereby.

Instruction numbered nineteen was asked by plaintiff in error as follows:

"The jury are further instructed that the burden of proof is upon the state to prove by competent evidence beyond a reasonable doubt, not only that the defendant killed the said John Cameron, but also that the defendant killed the said John Cameron, as charged in the indictment, with malice aforethought; and you are not authorized to presume from the fact of the killing being proven that the same was done with malice aforethought." To this the court added "changed by adding 'unless you find that the killing was done with a deadly weapon previously prepared.'"

It is insisted that there was no evidence of a "weapon previously prepared," and that the change in the instruction was prejudicial error.

The proof showed that the skull found with the decayed remains of the deceased presented evidence of having been penetrated by some instrument, presumably a leaden ball shot from a gun or pistol, and when the body was found there was a bullet inside the cavity of the skull and it was also shown that immediately before plaintiff in error and deceased left Warren's plaintiff procured from another a revolver, cleaned and repaired it for the purpose of taking it with him, and did so. These facts, with others, were a sufficient basis for the addition to the instruction of which complaint is made. The conclusion from the facts proved was for the jury. From them they might infer the previous preparation of the deadly weapon and its use. It is also claimed that this instruction is erroneous for the reason that the court by it singles out and makes prominent the fact of the previous preparation of the instrument of death. This instruction will not bear the construction claimed. The rule evidently sought to be contended for is stated in *Markel v. Moudy*, 11 Neb., 218, which is, that undue prominence should not be given to one item of the evidence, but we know of no rule of law relative to instructions which forbids the submission of a question of fact to the jury as is done in the instruction under consideration. No reference is made to any item of the evidence, nor is the attention of the jury called to the testimony of any witness.

Instruction numbered twenty asked by plaintiff in error was as follows: "The jury are further instructed that in order to convict the defendant under the indictment, it devolves upon the state to prove by competent evidence, beyond a reasonable doubt, that said John Cameron died within a year and a day after the cause of death was administered to him, and it must further be proven, beyond a reasonable doubt, by competent evidence, that said cause of death was administered by the defendant, as charged in the indictment. The jury are further instructed that it is

not sufficient for the state to prove that the body of John Cameron was found in Gage County, Nebraska, but it must be proved by competent evidence beyond a reasonable doubt that the said John Cameron was unlawfully killed by the defendant in Gage County, Nebraska," which instruction the court changed by adding, "But the place where the remains were found, if found at all, may be taken into consideration, together with all the other evidence, in fixing the locality of the homicide, if there was a homicide."

It is claimed by plaintiff in error that he was entitled to the instruction, as asked, without the addition or change by the court, and that the finding of the body over a year after the alleged crime was committed was no evidence of the locality of the crime. We think there was no error in the addition to the instruction. It was entirely competent for the jury to take into consideration all the circumstances proven as to the discovery of the body both as to the time and place of the alleged killing. The condition of the remains as to decay and the manner of concealment, the condition of the clothing, and "all the other evidence" in this case was proper for them to consider in arriving at a correct conclusion upon the two important questions submitted by the instruction as asked by the accused.

Instructions numbered ten and twelve asked by plaintiff in error were refused and this refusal is assigned for error. It must suffice here to say that the substance of these instructions were given in other instructions and it was unnecessary to repeat them. *Olive v. The State*, 11 Neb., 30; *Binfield v. The State*, 15 Id., 489; *Comstock v. The State*, 14 Id., 208; *Kerkow v. Bauer*, 15 Id., 167; *Kopplekom v. Huffman*, 12 Id., 100.

Instruction numbered fourteen asked by plaintiff in error was properly refused. It was, in substance, that in weighing testimony greater care should be taken by the jury in

relation to the testimony of persons who were interested in or employed to find evidence against the accused than with reference to other witnesses, because of the tendency of such to construe everything as evidence against the accused, and to disregard those things which do not tend to support their preconceived opinions. We find nothing in the case which would warrant the giving of this instruction. Instructions must be applicable to the testimony introduced on the trial. *Dunbier v. Day*, 12 Neb., 605; *Bradshaw v. The State*, 17 Neb., 147, and cases cited.

The fifteenth instruction asked by plaintiff in error and refused is copied from the statutes of this state, giving the boundaries of Gage county, with the further direction that unless it was proven that the offense was committed within such boundaries the jury must acquit. This instruction was given in substance by the fourth instruction given by the court on its own motion. This was sufficient.

The next question presented is the refusal of the court to give the eighteenth instruction asked by plaintiff in error. It is as follows: "The jury are further instructed that if they find from the evidence beyond a reasonable doubt that the defendant committed the offense charged in the indictment upon the Otoe and Missouri Indian Reservation, a tract of land set apart for the sole and exclusive use of the Otoe and Missouri tribe of Indians as a reservation, and within the boundaries of said reservation, then they will find for the defendant."

The contention of plaintiff in error is, that if the crime was committed on the reservation referred to, the courts of this state have no jurisdiction to punish the offender, that jurisdiction rests alone in the courts of the United States. This question has been before this court heretofore, and it has been held that the state courts have jurisdiction in such cases. See *Marion v. The State*, 16 Neb., 358, and cases there cited. There is no reservation

in the Enabling Act passed by the Congress of the United States, April 19, 1864, by which the boundaries of the state are fixed, but it is expressly provided "That the said state of Nebraska shall consist of all the territory included within" the boundaries fixed. No relinquishment of the place in question has ever been made by the state, and it is within the boundaries described. We adhere to our former holdings upon this part of the case, both upon the ground that we believe them to be correct, and for the further reason that having been so decided in this case on its previous hearing, *Marion v. The State*, *supra*, it has become the law of the case. *Hiatt v. Brooks*, 17 Neb., 33. *Leighton v. Stuart*, 19 Id., 546. The alleged crime was committed by one white man against another; both being subject to the laws and jurisdiction of the state.

Instruction numbered twenty-one, asked by plaintiff in error, that the jury were the "judges of the law and fact," was refused. This is assigned for error. The instruction was based upon the provision of section 195 of the criminal code in force at the time of the commission of the offence. (See Revised Statutes 1886, page 637), which provided that "juries in all cases shall be judges of the law and the fact." This provision was repealed upon the taking effect of the present criminal code on the first day of September, 1873, and the question here presented is, whether or not the action of the trial court complained of was erroneous, provided the instruction should have been given had the law remained in force up to and including the time of the trial. We do not deem it necessary to enquire as to what right to the instruction was given by the provision quoted from the section, but will only enquire whether or not the right to have the jury pass upon the law was one of which plaintiff in error could not legally be deprived; the law being in force at the time of the alleged homicide.

On the former hearing of this case (16 Neb., 349), it was

held that plaintiff in error must be tried by the law in force at the time of the commission of the offense, and any law which "makes an action done before its passage, which was innocent when done, criminal, and punishes such action, or that aggravates a crime or makes it greater than when it was committed, or which, in relation to that offense or its consequences, alters the situation of the party to his disadvantage, or that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed, is an *ex post facto* law, and, in so far as it affects the punishment of the party to his disadvantage, is void." To that decision we still adhere. The question presented by this record is, does the repeal of the provision contained in the section of the former criminal code referred to, and the enactment of section 255 of the present criminal code contravene that decision or any rule of law to the disadvantage of plaintiff in error? Section 255 is as follows: "No offense committed, and no fine, forfeiture or penalty incurred under existing laws previous to the taking effect of this code, shall be affected by the repeal herein of any such existing laws, but the punishment of such offenses, the recovery of such fines and forfeitures shall take place as if said laws repealed had remained in force; *Provided*, That the manner of procedure for the enforcement or imposition of all such punishments, and the collection of all such fines and forfeitures, shall be in accordance, or as nearly in accordance with the provisions of this code as the nature of the case will admit; and in any case whatever, should the procedure provided for in this code be wholly inadequate, the procedure provided for in the laws repealed by this code may be followed so far as necessary to prevent a failure of justice."

The phrase, "the manner of procedure for the enforcement or imposition of all such punishments," clearly includes the provision of the former statute to which we have alluded. The procedure only has been changed. The

degree of punishment, the character of the offense, and the rules of evidence, remain as under the former law. It may be observed that the only change in the law is to provide another tribunal to pass upon the law of the case. Prior to the change, if the words in the former code are to be taken at their full meaning and import, the jury were the judges as to the law of a case on trial. After the change the court sits in that capacity and is the judge of the law. No vested right of the plaintiff in error is affected. A new tribunal may be erected, or a new jurisdiction given to try him, and no right is abridged. *Com. v. Phillips*, 11 Pick. (Mass.), 28.

In *The People v. Mortimer*, 46 Cal., 114, it is said: "It is clear, therefore, that no constitutional difficulty would be encountered in requiring past offenses to be tried under new forms of procedure, and it is equally clear that, if such offenses are to be tried only under the old forms, and later offenses under the new, it would or might 'create endless confusion in legal proceedings.'"

Judge Cooley, in his very able work on *Constitutional Limitations*, 4 ed., at page 331, in discussing this question, says: "But so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime."

In Vol. 1, Sec. 115, Bishop on Criminal Procedure, it is said: "It is a doctrine extending through every department of the law, that rights, when vested in individuals, are unchangeable, while the remedies by which those rights are enforced may be varied from time to time at the pleasure of the legislature. Now within this principle, the absolute rights of prisoners, especially the constitutional ones, in respect to their defense, cannot be taken away. But they can be modified as to time, place, and manner of their enforcement—only the substance of them must be preserved."

We therefore conclude that the law is not *ex post facto* and within the inhibition of the constitution of the United States, nor of this state, and that plaintiff in error has been deprived of no substantial right by the refusal of the trial court to instruct as requested.

Instructions numbered twenty-two, twenty-three, twenty-five, twenty-eight, twenty-nine and thirty-one, asked by plaintiff in error, were refused by the court, but as these instructions were all given in substance in the instructions which were given, we need give them no further attention.

Objection is made to the form of the verdict. It is as follows:

"THE STATE OF NEBRASKA, }
 V.
JACKSON MARION, }

"We, the jury, duly empaneled and sworn, do find the defendant guilty of murder as charged in the indictment, and do fix the penalty to be death.

"A. D. McCOMB, Foreman."

By plaintiff's brief it is insisted that "under the decisions of this court, and by the weight of authority generally, this verdict cannot be sustained, and such a verdict conferred no power on the district court to pass sentence." This objection is quite general, and were it not for the

cases cited we would be at a loss to know the particular objection insisted upon. But, guided by the references, we conclude that the objection is that the degree of the murder is not ascertained by the jury. By the law under which plaintiff in error was tried, and which was in force at the time of the alleged homicide, murder consisted in the unlawful killing of a human being, with malice aforethought, express or implied. It was not divided into degrees as by the present code. A finding of guilty of "murder," was a full compliance with the requirements of the law under which the trial was had.

The remaining questions presented may be disposed of together and without extended discussion. They are:

First. That one of the jurymen who sat on the trial of the case had previously formed and expressed an opinion as to the guilt or innocence of plaintiff in error.

Second. That another one had been drinking heavily of intoxicating liquors just before and during the trial.

Third. That some of the jurymen had and read during the progress of the trial copies of a newspaper containing accounts of the trial and statements of matter not in evidence, and affecting the character of defendant; and

Fourth. Misconduct of witnesses for the state and friends of the deceased, during the trial and in the presence and hearing of the jury, in expressing themselves against plaintiff in error and in favor of the prosecution, by which plaintiff in error was prevented from having a fair and impartial trial.

Upon all of these questions a number of affidavits were made and filed in the district court before the decision upon the motion for a new trial. Every allegation of fact made by the affidavits presented by plaintiff in error was fully met and disproved or explained away by the counter affidavits of all the jurymen (except one who was absent) and by the officers of the court. The ruling of the dis-

trict court upon the questions presented by these affidavits was correct and cannot be molested.

Finding no error in the record to the prejudice of plaintiff in error, the judgment of the district court must be affirmed, which is done.

. JUDGMENT AFFIRMED.

THE other judges concur.

WARRICK PRICE, PLAINTIFF IN ERROR, V. LANCASTER
COUNTY, DEFENDANT IN ERROR.

Taxes: LAND GRANT TO RAILROAD. Certain land in an odd-numbered section within the limits of the B. & M. railroad grant was claimed by that corporation, and also adversely by various parties under the homestead and pre-emption laws. In 1877 the land was assessed and taxes levied thereon, and the land sold to one P., who paid the taxes on said land for 1878 and 1879. Afterwards the county treasurer made an entry on his record of sale that said land was not subject to taxation. P. thereupon brought an action against the county to recover the amount paid, with interest; *Held*, That the corporation having earned the land by the completion and acceptance of the road, was the equitable owner of said land, and that the same was taxable notwithstanding the failure of said company to pay the fees for the entry of the same.

ERROR to the district court for Lancaster county. Heard below before POUND, J.

Groff, Montgomery & Jeffrey, for plaintiff in error.

W. J. Lamb and Ricketts & Wilson, for defendant in error.

MAXWELL, CH. J.

The plaintiff filed a claim with the county commissioners of Lancaster county for certain taxes paid by him upon

land which he alleges was not subject to taxation. The commissioners rejected the claim. The plaintiff then appealed to the district court, where the order of the commissioners rejecting the claim was affirmed.

The causes of action, as stated by the plaintiff in the district court, are as follows: That "On February 10th, 1879, the said plaintiff at private tax sale at the treasurer's office of and in the said county of Lancaster, Nebraska, purchased the south-east quarter of section five, in township eleven, of range seven east, situated in said Lancaster county, Nebraska, for the sum of \$28.45, that being the amount of taxes, costs, and charges, levied and charged against said land for the year 1877, and which were unpaid and delinquent and for which said land had been advertised for sale; said plaintiff paid said sum to the treasurer of said Lancaster county, who issued and delivered to the said plaintiff a certificate of said sale. Of said sum of \$28.45 the sum of \$22.45 was paid on account of taxes, costs, and charges claimed to be due the said county, and said sum of \$22.45 was afterwards accounted for by the said treasurer and by him paid into the treasury of said county.

"On June 20th, 1879, the said plaintiff paid to the treasurer of said county the sum of \$20.92, levied and charged against said land and claimed due on account of the taxes of 1878, and the said treasurer issued and delivered to the plaintiff a tax receipt therefor. Of said sum of \$20.92, the sum of \$14.68 was paid on account of taxes claimed to be due the said county, and said sum of \$14.68 was afterwards paid and accounted for to the treasury of said county by the said treasurer.

"On July 30th, 1880, the plaintiff paid to the treasurer of said county the sum of \$17.50, levied and charged against said land on account of the taxes of 1879, and the said treasurer issued and delivered to the said plaintiff a tax receipt therefor. Of said sum, the said treasurer after-

wards paid and accounted to the treasury of said county for the sum of \$12.26, which amount had been paid by the plaintiff on account of taxes due said county for said year.

"On the 27th day of September, 1881, on delivery to the treasurer of said county of the above mentioned tax certificate of sale by the plaintiff, the said treasurer made, executed, acknowledged and delivered to the plaintiff a tax deed of said land, which deed was afterwards recorded in office of clerk of said county.

"The plaintiff further alleges that during the said years of 1877, 1878 and 1879, the said land was not subject to taxation, and the said land was assessed for taxation in said years by mistake of the assessor of said county, and there was no tax really due on said land at the time of said sale and said payments; that said land was, during said years the property of the United States of America, and had never been patented or otherwise conveyed by the said United States of America to any person; by reason of said facts said sale was illegal and void, and the plaintiff received no consideration for the payments above set forth.

"On the 15th day of December, 1882, the plaintiff returned the said tax deed to the treasurer of said county for cancellation, and said treasurer cancelled said deed and made an entry opposite said tract of land on the record of sale, that the same was erroneously sold.

"On December 15th, 1882, the plaintiff made a sworn statement or account of said payments, and of his claim against said county arising by reason of the foregoing facts, and filed the same with the clerk of said county in his office, for presentation to and action thereon by the board of county commissioners," which board rejected the claim, etc.

The county, in its answer, denies the facts stated in the petition, and alleges that the land in controversy, in the years 1877, 1878, and 1879, was within the twenty-mile

limit of the grant to the Burlington and Missouri River railroad, and was withdrawn from market on the 20th of February, 1866, and at the dates aforesaid was the property of said railroad company.

The evidence in the case consists of the following letter :

“ DEPARTMENT OF THE INTERIOR,

“ GENERAL LAND OFFICE,

“ WASHINGTON, D. C., April 5th, 1882.

“ *Messrs. Groff & Montgomery, Omaha, Nebraska :*

“ GENTLEMEN :—In reply to your letter of the 7th of February last, you are informed that the status of the S. E. $\frac{1}{4}$ Sec. 5, T. 11 N., R. 7 E., Nebraska (the land in controversy), as shown by the records of this office, is as follows :

“ Said tract is within the twenty-mile limits of the grant of July 2, 1864 (13 Stats., p. 364), to aid in the construction of the Burlington and Missouri River railroad, the right of which attached by definite location June 15, 1865.

“ The withdrawal of the odd numbered sections for said grant was ordered February 3, 1866, and became effective by receipt of the order at the local office on the 20th of the same month.

“ Edwin Galvin filed pre-emption declaratory statement No. 573 for said tract July 27, 1865, alleging settlement on the 28th of June preceding, but failed to follow this with proof and payment as required by law.

“ June 17, 1871, Charles F. Echols made homestead entry No. 8,378, on the S. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, and his entry was cancelled January 22, 1873, for relinquishment.

“ Hiram Echols filed pre-emption declaratory statement No. 7,976, for N. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, June 19, 1871, alleging settlement two days prior, but afterwards relinquished the same.

“ R. B. Echols made homestead entry No. 8,462, June 27,

1871, on the N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, which entry was cancelled January 27, 1873, for relinquishment.

"February 17th, 1873, George W. Flora made homestead entry No. 12,441, on the entire S. E. $\frac{1}{4}$. Under date of Nov. 12th, 1874, this office decided that Galvin's filing, even if valid, did not defeat the right of the company, as settlement was not made until the right of the road attached. Flora's entry was held for cancellation subject to appeal, and the land awarded to the company. This decision was affirmed by the Secretary of the Interior, on appeal, June 4th, 1875.

"This office, by letter of June 9th, 1875, advised the local officers of the decision of the department, and informed them that Flora's entry would be suspended from cancellation until receipt of information whether the company would relinquish its claim in his favor and take other land under act of June 22d, 1874. They were directed to address the officers of the company, requesting such relinquishment, and to advise this office of their reply. Under date of June 28, 1875, the receiver forwarded a letter from the land commissioner of the company, dated June 24, 1875, in reply to their request for a relinquishment in favor of Flora, stating that under the circumstances he was without authority to make such relinquishment. By letter of July 8, 1875, referring to the foregoing, the local officers were informed that said homestead entry had that day been cancelled on the records and files of this office, and they were directed to make the proper notes on their records and advise the parties in interest.

"July 12, 1875, Mr. Flora tendered final proof under the homestead laws, claiming the benefit of military service under the act of June 8, 1872 (Sec. 2,205, Rev. Stats. U. S). His proof was not allowed by the register, because of the claim of the railroad company. This action was approved by office letter "C," dated Aug. 4, 1875.

"Under date of Dec. 4, 1877, the register transmitted the

petition of said homestead claimant for the issue of patent on his entry, claiming that he was entitled to the relief provided by the act of April 21st, 1876.

"February 5, 1878, this office allowed the railroad company thirty days in which to file objections to the application for reinstatement of said entry and the issue of patent, and so advised the local officers and the attorneys of the parties.

"With letter of March 13, 1878, the attorney for the company filed in this office the affidavit of Edmond Galvin, dated Feb. 23, 1878, setting forth that he is the person who filed declaratory statement No. 573 for the tract in question; that his filing was a mistake, it being his intention to file for the S. E. $\frac{1}{4}$ Sec. 5, T. 10 N., R. 7 E.; and that he never made any settlement or improvement whatever upon the tract in controversy. Under date of March 30th, 1878, this office held that there was no valid subsisting claim to said tract at the date of the withdrawal for the benefit of the railroad company, consequently Flora's homestead entry was not confirmed by the act of 1876, and his application for reinstatement of the same was rejected subject to appeal within sixty days.

"June 5, 1878, he filed in the local office an application for further time to furnish proof of the good faith of Galvin's pre-emption filing. This application was forwarded with the register's letter of the 11th of the same month. It was denied by this office March 5, 1879, but the applicant was allowed a reasonable time for appeal from the decision of March 30th, 1878. May 20, 1879, the receiver reported that Flora had been duly notified of this decision but had taken no action in the matter.

"By letter of May 31, 1879, the local officers were advised that the decision of March 30, 1878, was declared final, and said homestead would remain cancelled on the records of this office, and that the case was closed.

"I find no record of any further action by either of the parties in this case.

"The company has not formally selected the tract in question, and consequently no patent has issued therefor.

"Very respectfully,

"N. C. McFARLAND,

"Commissioner."

The only ground upon which it seems to be claimed that the lands are exempt from taxation is, that the railroad company had not paid the fees for entering said land, hence the right to a patent was not complete until said fees were paid. We cannot give our assent to this proposition.

Section 20, of the act making the grant, provides "that whenever said Burlington and Missouri River Railroad Company shall have completed twenty consecutive miles of the road mentioned in the foregoing section in the manner provided for other roads mentioned in this act, and the act to which this is an amendment, the President of the United States shall appoint three commissioners to examine and report to him in relation thereto; and if it shall appear to him that twenty miles of said road have been completed, as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company on each side of said roads, as far as the same is completed, to the amount aforesaid; and such examination, report, and conveyance by patents, shall continue from time to time in like manner until said road shall have been completed," etc.

It will be seen that the grant is absolute, patents to be issued upon the certificates of the commissioners as each twenty miles of road was completed. The company earned the land by the construction of the road, and, upon the acceptance of each twenty miles, became the equitable owners of the odd numbered sections not otherwise appropriated when the line was definitely fixed, within twenty miles on each side of the road. When the road was constructed and accepted the company became the equitable

owner of the land in question, and such ownership being property within the state, was subject to our revenue law, and was taxable. *White v. B. & M. R. R. Co.*, 5 Neb., 393. In the case cited, it was held that where there was no exemption in the grant, the question of the taxation of such lands was governed by the laws of the state. That we regard as a correct statement of the law, and it is adhered to. It is probable that the cause of failure of the company to pay the fees for entering the land in question was the adverse claim of others; but this would not under the facts agreed upon in this case, exempt the land from taxation.

By what authority the treasurer sought to cancel the tax deed does not appear, nor is it material to inquire, as the lands were clearly subject to taxation. The county treasurer can perform no judicial duties in the premises. It is only when in fact lands which have been assessed, were not subject to taxation, or legally assessed on which taxes have been paid, that the treasurer can make any entry as provided in section 133 of chapter 77 of the Compiled Statutes, that the land was erroneously sold. If the land was in fact taxable, such entry will not preclude the county from recovering the taxes due upon the land. The power of determining the validity of a tax actually levied is a proper subject for the courts—the question is one of law, and not of fact. Where, however, taxes have been paid upon land, and it is afterwards by mistake sold for the same taxes, there being no authority to sell in such case, and the question being one of fact, the treasurer no doubt may make the entry required. It is apparent that the land in question was taxable at the time it was assessed, and that the plaintiff is not therefore entitled to recover the amount of such taxes from the county. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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| 20 | 360 |
| 43 | 370 |

SOLOMON KIRK, PLAINTIFF IN ERROR, V. ISAAC W. BOWLING, DEFENDANT IN ERROR.

1. **Will: PROBATING.** A probate court having jurisdiction of the subject matter and the parties, made an entry as follows: "It appearing to me from said testimony that said instrument is the last will and testament of the said Joab Hobbs, and that he was in all respects competent to make a will, it is therefore ordered by me that said instrument be admitted to probate as and for the last will and testament of the said Joab Hobbs, which said instrument is in the words and figures following, to-wit:" (copying the will). In a collateral proceeding, *Held*, A sufficient order of the probate of the will.
2. **Ejectment: REMAINDER-MAN: EVIDENCE.** Where real estate is devised to take effect upon the death of a party named who has a life estate in the premises, a party claiming under the will, in an action of ejectment, to obtain possession of the land must prove the termination of the life estate.
3. ———: **TENANT IN COMMON.** A tenant in common of real estate can only recover in ejectment to the extent of his title.

ERROR to the district court for Lancaster county. Tried below before MITCHELL, J.

James E. Philpott, for plaintiff in error.

Sawyer & Snell, for defendant in error, cited: *Austin v. Cambridgeport*, 21 Pick., 224. *Stearns v. Harris*, 8 Allen, 598. *Dale v. Hunneman*, 12 Neb., 221.

MAXWELL, CH. J.

This is an action of ejectment brought by Bowling against Kirk to recover the possession of the north half of the south-east quarter of section twenty-six, township eight, range five east.

Kirk, in his answer, denies that Bowling has a legal estate in said land, or is entitled to the possession thereof,

and also pleads the statute of limitations as a bar. On the trial of the cause in the court below a verdict was rendered in favor of Bowling, upon which judgment was rendered.

The testimony shows that Joab Hobbs entered the land in question, and received a patent from the United States; that in the year 1866 he made a will, which was admitted to probate in 1874, as follows :

"In matter of probate of Joab Hobbs, Feb. 24, 1874, case called, petitioner and subscribing witness appeared. No person appeared to contest the probate of said will, and it appearing that due notice was given, * * * Thomas McNeil, one of the subscribing witnesses, was sworn and examined, that said instrument is the last will and testament of said Joab Hobbs, and that he was in all respects competent to make a will. It is therefore ordered by me that said instrument be admitted to probate as and for the last will and testament of the said Joab Hobbs, which instrument is in the words and figures following, to-wit: Know ye all men by these writings that I, Joab Hobbs, being sound of mind, do make this my last will as follows: I will to my wife, Amanda Hobbs, my real estate and personal property, to be held and used by her during her lifetime, and at her death I will eighty acres of my land to John Wesley Hobbs, my son, said eighty acres being the north half of the N. W. quarter of section No. 25 in township No. 8, north of range No. 5 east. The balance of my land, being eighty acres, with all my personal property, shall be equally divided among the balance of my children."

Objection is made to the probate of the will as not being sufficient. The testimony shows the filing of a petition for the probate of the will, the giving of notice by publication of the time and place when and where a hearing would be had upon the matter, and the calling of one of the subscribing witnesses to prove the execution of the will, from whose testimony it appears that the will was properly

executed in all respects, and that the testator was of sound mind. The will therefore was duly proved and it was ordered by the judge "that said instrument be admitted to probate as and for the last will and testament of the said Joab Hobbs." Under the common law rule the executor before proving the will could perform almost any of the acts incident to his office except those relating to certain suits. Thus he might seize and take into his hands any of the testator's effects. He might pay or take releases of debts owing from the estate, and might receive or release debts which were owing to it. So he might sell or dispose of the goods and chattels of the testator. Bac., Abr., tit. Exrs. and Adms., E, 14. Wentworth's Office of Exr., (14 ed.) 81 *et seq.* Willard on Exrs., 146-147.

The reason for the rule is very clearly stated by Judge Swan in his valuable work on Pleading and Precedents, 74, that "In England an executor derives title, not from the probate, but from the will; and hence the rule that if there be several executors, though some of them be under age, or have not proved the will, they must all join in one action." Under our system the executor derives his title and authority from the letters testamentary. The probate of a will is the proof before an officer authorized by law that the instrument offered to be proved or recorded is the last will and testament of the deceased person whose testamentary act it is alleged to be. 2 Bouv. Law Dict. (14 ed.), 378. In England, at common law, the ecclesiastical courts had no jurisdiction of devises of lands, therefore in matters affecting the title or possession of real estate claimed under the will, the original must be produced and proved the same as any other disputed instrument. In this country, however, under the provisions of the statutes of the several states, the probate of a will is generally conclusive in a collateral proceeding. *Bush v. Sheldon*, 1 Day, 170. *Judson v. Lake*, 3 Id., 318. *Laughton v. Atkins*, 1 Pick., 535. *Brown v. Lanman*, 1 Conn., 467. *Jackson*

v. Robinson, 4 Wend., 436. *Jackson v. Hixon*, 17 John., 123. *Dublin v. Chadbourne*, 16 Mass., 483. *Stanley v. Kean*, Taylor, 93. *Wells' Will*, 5 Lit., 273. .

In *Brown v. Burdick*, 25 Ohio State, 260, it was held that a copy of the probate and record of a will, duly certified by the probate judge, is conclusive evidence of the validity of the will, on the trial of a collateral issue between a stranger and the devisee respecting the property devised; and it is admissible as evidence on the trial of such issue, notwithstanding proceedings to contest it may be pending at the time it is offered and admitted in evidence. *Mears v. Mears*, 45 O. S., 90.

The judgment of the probate court, where it has jurisdiction, finding that a will is valid and admitting it to probate, is final and conclusive unless reversed or modified in some of the modes prescribed by law. Freeman on Judgments, § 319, and cases cited.

Considerable stress is laid by the plaintiff in error upon the fact that the record does not show that the will was *allowed* by the probate court. In Section 141 of Chapter 23, Comp. Stat., relating to decedents, it is provided that "the court may in its discretion" grant probate thereof on the testimony of one of the subscribing witnesses only; and in section 143 of the same chapter, it is declared that "no will shall be effectual to pass either real or personal estate unless it shall have been duly proved and allowed in the probate court," etc. It will be seen the words "granted" and "allowed" are used in different sections to denote the same thing—the probate of the will. Even in criminal law, where nothing is taken by intendment, it is unnecessary to charge the commission of an offense in the language of the statute, provided the words employed are the equivalents in meaning of those contained in the statute. *Whitman v. State*, 17 Neb., 224, and cases cited. The rule is less stringent in civil actions, and the mere failure to use the exact lan-

guage of the statute will not of itself constitute a valid objection to a judgment or order. At least it cannot be collaterally assailed upon that ground alone. The order admitting the will to probate in this case is not as full as could be desired, but it is sufficient to show the action of the court, and is a valid order of the probate of the will. The first objection, therefore, is not sustained.

2nd. It will be observed by the terms of the will that Joab Hobbs devised to his wife, Amanda Hobbs, his real estate and personal property, to be held and used by her during her lifetime; and at her death the estate was to be divided by giving to John Wesley Hobbs the north half of the north-west quarter of section No. twenty-five, in township No. eight north of range five east; and the remainder of his land, being the eighty acres in controversy, with all his personal property, was to be equally divided between his other children. Now, when was this division to take place? Clearly not before the death of Mrs. Amanda Hobbs. She is to have the use of all the real estate and all the personal property during her life; then, at her death, the will provides how the estate is to be divided. We find no evidence in the record that Mrs. Hobbs is dead. It is said that there is such testimony in the record offered in support of the second cause of action which was withdrawn from the jury. However that may be, we have no such evidence before us. There was, therefore, a failure of proof upon a material point which was necessary to entitle Mr. Bowling to recover.

3d. Bowling claims title to the premises in question as the grantee of Sarah A. Wells and Eveline Etherton, two of the children of Joab Hobbs. The testimony shows that there are a large number of other children of said Joab Hobbs entitled to an interest in said lands under said will, yet Bowling seeks to recover all of said land in this action. This he cannot do.

In *Mattis v. Boggs*, 19 Neb., 698, it was held, in eject-

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ment by a tenant in common against a person in possession without right, the plaintiff can recover only to the extent of his title. The decision in that case was not made until the question had been carefully and thoroughly examined; and although it modified somewhat the ruling in *Crook v. Vandervoort*, 13 Neb., 505, no member of this court, so far as the writer is aware, doubts its correctness; and, as said in *Mattis v. Boggs*, 704, "no other rule than the one here adopted could accord with the principles of the code, and that it is founded in reason and the principles of justice." We therefore hold that a tenant in common can only recover to the extent of his title. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

GILEAD P. CHENEY, APPELLANT, V. WILLIAM L. DUNLAP ET AL., APPELLEES.

1. The Evidence before the district court *Held* insufficient to sustain its finding and judgment.
2. Evidence: EXPERT TESTIMONY. The age or date of the actual execution of a written paper *Held*, Not to be a question of science, skill, or trade, nor one of the like kind upon which a witness may testify and give his opinion as an expert upon its mere inspection.

APPEAL from the district court of Johnson county.
Heard below before BROADY, J.

B. F. Perkins and *L. W. Colby*, for appellant.

S. P. Davidson, for appellees.

COBB, J.

This case differs but in one respect from that of *Cheney v. Janssen*, *ante* p. 128.

Upon the trial, as appears by the bill of exceptions, it was admitted by the plaintiff that the notes and mortgage sued on are based upon an usurious loan of money, etc. The plaintiff offered "in evidence the notes and mortgage sued on in this case. * * * Plaintiff offers in evidence the endorsement on the backs of the three notes, and makes it a special offer for the purpose of showing whether the signatures were recently made or not. Objected to as immaterial, irrelevant, and incompetent. Objection overruled. Defendant excepts." Then comes the following entry: "It is admitted that these are the notes and mortgage sued on, and that the signatures are genuine, and that the notes and mortgage were signed by the parties purporting to sign them, and were endorsed by P. D. Cheney." Thereupon the plaintiff rested his case, and the defendant offered in evidence the deposition of J. J. Kelly and R. C. Outcalt, as follows:

(a) Deposition of Joseph J. Kelly: Have followed business of banking about fifteen years; am with Lincoln National Bank at present; formerly resided in Clinton, Illinois, for twenty-five years; was there several years clerk of the Circuit Court and several years cashier of DeWitt County Bank.

Q. State whether during your business or professional life it has been your business to examine signatures on documents and compare different styles of handwriting and signatures with reference to the age of the writing?

A. Such has been my experience to a considerable degree.

Q. I will now ask you to look at these papers (handing witness three notes attached to the petition in this case) and examine them particularly with reference to signature en-

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dorsed on the back of the notes, P. D. Cheney, and state whether in your opinion that signature was recently made

A. In my opinion the endorsement on the back of the notes has been made recently.

Q. State within how short a time would you say in your opinion that name has been endorsed upon these notes.

A. I could not name any specific time, but would say within a few months as my judgment.

Q. Would you say in your judgment this signature was made within the last year?

A. I would.

Q. You base your judgment upon the general knowledge you have of handwriting and examining documents and signatures upon the same, do you?

A. My answer is upon the general knowledge I have of writing and the general appearance of this signature, which indicates to my mind a recent transaction.

JOS. J. KELLY.

(b) Deposition of R. C. Outcalt: Am cashier of the Capital National Bank, Lincoln; been in this business sixteen years; it has been during my professional or business life my duty to compare signatures and examine writings with reference to their genuineness, and with reference to their comparison with other writing.

Q. I will ask you to look at three notes I now hand you (handing witness the three notes attached to the petition in this case), and ask you to examine them with reference to the signature of P. D. Cheney endorsed on the back of them and state whether in your opinion that signature was recently made or not.

A. I think it was recently made.

Q. State whether in your opinion the signature of P. D. Cheney was endorsed on these notes within the last year or not.

A. I think it was.

R. C. OUTCALT.

The findings and judgment of the court were for the defendant, and the plaintiff brings the cause to this court by appeal.

Numerous errors are assigned, but it is not deemed necessary to set them out in detail.

While it is probable that the controlling reason for the judgment was that in the opinion of the trial court the notes were barred by the statute of limitations following the judgment of the same court in *Cheney v. Woodruff, sup.*, yet the court may have been controlled by the evidence contained in the depositions of J. J. Kelley and R. C. Outcalt above set forth, and such possibility seems to render it necessary that we examine to some extent the question raised by the objection of the plaintiff to the admission of said depositions.

The supreme court of New Hampshire, in the case of *Jones v. Tucker*, 41 N. H., 546, say: "The rule determining the subjects upon which experts may testify, and the rule prescribing the qualifications of experts, are matters of law; but whether a witness offered as an expert has these qualifications is a question of fact to be decided by the court at the trial."

The case at bar was tried to the court without the intervention of a jury. It has been often decided by this court upon unquestioned authority that in cases so tried no question of error for the admission of evidence could arise. This case may then be disposed of upon the fourth assignment of error, to-wit: that the court erred in finding for the defendant.

The question upon which the decision of the case seems to have turned in the mind of the trial court was, whether the notes in question were endorsed by the payee before maturity. If they were, then the defense of usury was unavailable against the plaintiff; otherwise, if they were endorsed after maturity. The notes come to maturity respectively August 27, 1875, August 27, 1876, and Aug-

ust 27, 1877. The depositions above referred to were taken on the 5th day of October, 1885.

The only evidence before the court which in any way tended to contradict the testimony of the plaintiff that the notes were endorsed before maturity, was the said depositions.

Greenleaf thus states the law : "On questions of science, skill, or trade, or others of the like kind, persons of skill, sometimes called *experts*, may not only testify to facts, but are permitted to give their opinions in evidence." 1 Greenlf. Ev., § 440.

Having examined the books as thoroughly as the time at my disposal will permit, and failing to find any case involving facts similar to those of this case, and none being cited by counsel, the question of the sufficiency of the evidence to sustain the finding and judgment must be determined in the main by original consideration. I have found two cases, however, which will be cited as worthy of some consideration in support of the conclusion to which I have arrived.

The case of *Clark v. Bruce*, 12 Hun., 271, was brought upon three promissory notes. The statute of limitations was set up as a defense. The plaintiff relied upon certain partial payments endorsed thereon. Stephen Lockwood was called as a witness by the defendant, and testified "that he was, and had been, an attorney for over twenty years; that in his business he had had occasion to examine old and new writings, and to examine when they were claimed not to be genuine, and that he had examined the notes in suit, and the endorsements on them of 13th June, 1858, and 3d January, 1862." He was then asked: "In your opinion, were the endorsements of June 18th upon those notes written as long ago as they bear date?" He was also asked: "Are the endorsements of 13th June, 1858, and 3d January, 1862, written with the same pen and ink?" The defendant also offered to show by the witness

that each of the endorsements, in the opinion of the witness, "was written at a more recent time than its date, and that they were all written within two years past, judging from the appearance of the writing and ink." Upon objection the evidence was rejected. There was a judgment for the plaintiff. Upon appeal the supreme court say: "The questions and offer called for the opinion of the witness. He was not asked to state facts, to describe the appearance of the endorsements in any respect, but to give an opinion as to the time when the endorsements were made, based upon the appearance of the writing and the ink. What was the appearance of the writing and the ink does not appear by the evidence. We don't think the witness had shown himself to be an expert on that subject. To judge of the genuineness of hand-writing, that is, to judge whether it was written by the person whose hand-writing it purports to be, is one thing; to determine its age from its appearance it quite another. The witness may have had occasion to pass upon the genuineness of many writings, old and new, and yet never have been called on to form an opinion from the appearance of hand-writing, as to whether or not it was written at the time it bore date. * * * We think the objection was properly sustained."

The other case is that of *Ellinwood v. Bragg*, 52 New Hampshire, 490. I will quote only a part of the syllabus. "Upon the question whether a long account upon a party's books was written at different times, as purported to be, or whether it was all written with the same pen and ink, and at the same time, a witness testified that he had been in practice as a lawyer some forty years, and had about the same experience as lawyers in general in the examination and comparison of hand-writings; that he had been engaged in one or two cases which led him particularly to examine and compare hand-writing, but he did not claim to be able to give an opinion upon which any great reliance could be

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placed ; *Held*, That the admission of the witness to testify as an expert was erroneous." A new trial was granted.

Whatever reading, examination, and reflection I have been able to give to the case, has led me to the conclusion that it does not present a question of science, skill, or trade, nor one of a like kind. In other words, I do not think that any amount of science, study, or skill would enable a person by mere inspection, to judge or testify of the age of hand-writing with that accuracy necessary to its value or safety in judicial proceedings. The appearance of a written paper, some years, or even months old, will depend greatly upon the color, kind, and quality of the ink used, and greatly upon the receptacle or place where the paper has been kept, whether excluded from the air or sunshine, whether in a dry or damp, hot or cool place, and other conditions, the knowledge of which must be derived from sources other than inspection. Again, there is no recognized science or trade in which it can be said to be necessary that persons engaged in it should be skilled in detecting the age of writings by inspection. The science of the law, perhaps, comes nearer to it than any other, and the instances in which it becomes necessary or even useful that the legal practitioner should possess such skill are very rare.

I am therefore of the opinion that, whether the depositions were admissible or not, they do not contain sufficient evidence to sustain the finding and judgment of the trial court.

The judgment of the district court is therefore reversed, and a judgment for the plaintiff will be rendered in this court foreclosing the mortgage, and for the amount of the principal and interest called for by the notes, and an attorney fee of ten dollars, as provided for in the mortgage, and costs in both courts.

JUDGMENT ACCORDINGLY.

THE other judges concur.

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| 20 | 272 |
| 41 | 461 |

JESSE W. ANDERSON, PLAINTIFF IN ERROR, v. JAMES BUCHANAN, DEFENDANT IN ERROR.

Covenant: EVICTION: PLEADING AND PROOF. In an action on warranty deed for a breach of the covenant for quiet enjoyment the plaintiff must allege and prove that he has been turned out of the possession of the granted premises, or of some part thereof, or has yielded the possession thereof to the paramount title.

ERROR to the district court for Otoe county. Heard below before POUND, J.

Groff & Montgomery, for plaintiff in error.

S. H. Calhoun, for defendant in error.

COBB, J.

The following are the facts of this case, as appears from the abstracts:

The defendant in the court below was in the possession of the tract of land involved in the litigation by virtue of a tax deed from the county treasurer, had paid a large amount of taxes assessed and levied thereon subsequently to his deed, and had valuable permanent improvements on the land. He sold the land to one James H. Anderson, and conveyed the same to him by warranty deed.

The following is the covenant of warranty contained in said deed, as set out in the petition: "That he, the said defendant, would warrant and defend the said premises against the lawful claims of all persons whomsoever." That afterwards the said James H. Anderson sold the said land to the plaintiff and conveyed the same to him also by warranty deed. Afterwards one Hugh W. Markham and Frank D. Markham brought an action of ejectment against the plaintiff Buchanan, for the said lands,

claiming title thereto prior and paramount to the title of the defendant. The defendant was notified by Buchanan of the bringing and pendency of said action of the Markhams, and requested to defend the same, which he declined to do. Whereupon, and before the said action was brought to trial, the said Buchanan compromised the same with plaintiffs therein, the said Markhams, and paid them the sum of six hundred and eighty dollars, beside two hundred and twenty-six dollars and sixty-six cents, their attorney's fees, and forty-nine dollars and sixty-eight cents, his own attorney's fees and court charges, and received from the said Markhams a stipulation for a judgment, upon which a judgment was rendered and entered in said court in said action in favor of the said Buchanan against the said Markhams, and quieting the title of said Buchanan in said tract of land. Thereupon the said Buchanan brought his action against the plaintiff in error, Jesse W. Anderson, upon his covenants of warranty in his said deed to James H. Anderson, claiming judgment in the sum of \$955.21 for breach thereof. The said Jesse W. Anderson, defendant, answered, setting up several defenses, particularly that on February 13, 1880, when he conveyed to James H. Anderson, he claimed to be the owner of said land by virtue of certain tax sales and deeds, and payments of taxes, and for improvements made on the land, and that his interest in said land by reason thereof exceeded in the aggregate up to March 19, 1884, the sum of \$1,045, and interest from February 13, 1880, of which interest the said Buchanan became the owner by virtue of his purchase and deed from James H. Anderson, and which he would have been entitled to recover from the Markhams, if they, as the claimants of the paramount title, had succeeded in the prosecution of their action against Buchanan, etc.

There was a trial to the court (a jury being waived) which found for the plaintiff and rendered a judgment

against the defendant for \$805.83, with costs. The defendant brings the cause to this court on error.

There are ten errors assigned, seven of which are for the alleged wrongful admission of evidence at the trial. These errors cannot be considered, as the trial was to the court, without the intervention of a jury. The whole question turns, then, upon the merits of the finding and judgment.

So much of the petition as is set out in the abstract is in the following words, to-wit: "That on February 13, 1880, the said Jesse W. Anderson conveyed certain land by warranty deed to one James H. Anderson for the consideration of \$1,045, and that on May 21, 1880, the said James H. Anderson by warranty deed conveyed the same land for the consideration of \$1,200 to said James Buchanan, who thereupon immediately entered upon said premises and was possessed thereof; that said Jesse W. Anderson did not have a good and sufficient title to said land and would not warrant and defend the same against the lawful claims of all persons, especially Hugh W. Markham and Frank D. Markham, who up to March 19, 1884, were the owners of the paramount title to said land; that on said March 19, 1884, said Markhams having prior to that time sued Buchanan in an action in said Otoe county district court to recover possession of said land, Buchanan, to prevent being evicted and ousted, paid for said Markham's outstanding title and necessary costs and expenses of said action the sum of \$955.21, for which amount, with interest from March 19, 1884, judgment was prayed."

It thus appears that the covenant for the breach of which the action was brought is a covenant for quiet enjoyment, and that there has been no eviction or ouster of the plaintiff; but that to prevent such eviction and ouster plaintiff bought in the claim or alleged paramount title of the Markhams, and continued in the actual possession and enjoyment of the land.

Anderson v. Buchanan.

The case of *Real v. Hollister*, in this court, *ante* p. 112, was in its leading features identical with the case at bar. In that case, however, there had been a judgment of ouster against the plaintiff, but there was neither allegation or proof that he had been actually turned out of the possession of the land. The court in the syllabus say: "In an action on a warranty deed for a breach of the covenant for quiet enjoyment the plaintiff must allege and prove that he has been turned out of the possession of the granted premises, or of some part thereof, or has yielded the possession thereof to the paramount title."

It is not claimed, nor can it be, that there are not many and highly respectable authorities to the contrary of the above decision, but I believe it to be one which may be followed with less danger of injustice to innocent parties than a rule which would permit a warrantee to compromise with the holder of the paramount title, paying him whatever sum might be agreed upon, whether reasonable under the circumstances or unreasonable, and recover it from the warrantor.

Having reached the above conclusion it is deemed unnecessary to discuss the other point raised by counsel in the brief.

The judgment of the district court is reversed and the cause dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

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| 20 | 276 |
| 38 | 84 |
| 20 | 276 |
| 47 | 37 |
| 20 | 276 |
| 62 | 284 |
| 20 | 276 |
| 60 | 500 |
| 20 | 276 |
| 62 | 862 |

**DANIEL DODGE, APPELLEE, v. THE OMAHA AND SOUTH-
WESTERN R. R. CO. ET AL., APPELLANTS.**

1. **Parties: TRANSFER OF PLAINTIFF'S INTEREST PENDENTE LITE.** Where an action has been commenced the transfer by the plaintiff of his interest in the subject of the action to another will not prevent the prosecution of the suit to its termination in the name of the original plaintiff.
2. **Railroads: EMINENT DOMAIN: MORTGAGE ON PROPERTY TAKEN.** Where real estate—as a town lot—upon which there is a mortgage duly recorded is taken by a railroad company for right of way purposes in the exercise of its right of eminent domain, and the whole of the lot is taken, the condemnation money being paid to the mortgagor and holder of the legal title, in an action against such railroad company by the mortgagee to foreclose the mortgage, the question as to whether by the condemnation proceedings the railroad company acquired the fee to the property or an easement is not deemed material and is not decided. The whole of the property being taken, the effect upon the mortgagee's security is the same.
3. ———: ———: **PARTIES.** Where a railroad company, in the exercise of its right of eminent domain, seeks to appropriate private property to its own use for the purpose of right of way, by condemnation and appraisalment, all persons having an interest in the property, including mortgagees, should be made parties to the proceeding by proper notice, and if such company fail so to do, and pay the money to a person not entitled thereto, such proceeding and payment are void as to all persons not parties thereto.
4. ———: **MORTGAGE: PAYMENT OF CONDEMNATION MONEY.** In case of such proceedings to condemn real estate upon which there is a mortgage of record, the condemnation money found due the owner of the land should be applied first to the payment of the amount due upon the mortgage and the remainder to the holder of the legal title. In case such payment is not made or tendered to the mortgagee by proper notice of the proceeding, he is not affected thereby, and may foreclose his mortgage as against the railroad company by proper action.
5. **Mortgage: FORECLOSURE: PARTIES.** The proceeding to foreclose a real estate mortgage is void as to all persons interested in the subject of the suit, who are not parties to the action. There-

fore, if such persons are not made parties another action may be instituted either by or against them for the purpose of determining their rights. If against them it may be by the purchaser of the property sold under the first foreclosure.

APPEAL from the district court of Douglas county.
Heard below before WAKELEY, J.

C. J. Greene and Marquett & Dewees, for appellants.

Redick & Redick, for appellee.

REESE, J.

The facts in this case, substantially as stated in the abstract, are as follows: On the 17th day of December, 1872, Rollin C. Smith and Wallace R. Bartlett were the owners of lot four in block 232, in the city of Omaha, as originally surveyed and platted; that on said day the said Smith and Bartlett borrowed \$1,000 of Daniel Dodge, appellee in this case. On the 6th day of March, 1873, for the purpose securing the payment of said amount, the said Smith and Bartlett executed and delivered a mortgage upon said above described real estate to the said Daniel Dodge, which mortgage was duly recorded March 20th, 1873.

On the 17th day of April, 1878, the Omaha and Southwestern Railroad Company, one of the appellants herein, condemned and appropriated all of said lot for right of way purposes, the said Omaha and Southwestern Railroad Company being a corporation duly organized under the laws of the state of Nebraska.

The railroad company took possession of, and has remained in possession of, the said property ever since.

That on February 23d, 1877, the said appellee, Daniel Dodge, filed his petition in the Douglas county district court against said Bartlett and Mary A. Smith and the administrators of Rollin C. Smith, then dead, setting forth the execution and delivery of said notes and mortgage.

The said railroad company was likewise made a party, but was thereafter dismissed.

A decree was taken against said Bartlett and Mary A. Smith and the administrators of Rollin C. Smith, at the February term of said court, for the sum of \$1,276.66, and \$51 attorneys' fees.

On May 2nd, 1877, an order of sale was issued out of said court, commanding the sheriff to sell said property in satisfaction of said decree, which order was returned on August 30th thereafter, endorsed, "Property not sold for want of bidders."

Afterwards, to-wit, April 12th, 1878, an alias order of sale was issued, commanding the sheriff of said county to appraise and sell said property in satisfaction of said decree, which alias order was, on the 29th of June, 1878, returned into said court endorsed, being not sold for want of bidders.

On December 1st, 1877, plaintiff filed his petition in said cause, asking that said judgment and first order of sale be set aside, and for leave to file an amended petition, making new parties defendant, to-wit: The Omaha and Southwestern Railroad Company and George C. Hobbey; and on December 1, 1877, it was ordered and adjudged by said court that the decree and order of sale be set aside and leave granted plaintiff as asked for in his petition. In accordance with said order, plaintiff, on January 17, 1878, filed an amended petition in said suit, making said Omaha and Southwestern Railroad Company and said George C. Hobbey parties defendant in said cause.

Afterwards, and on February 13, 1878, said Omaha and Southwestern Railroad Company, by its attorney, filed a motion asking that said order and all thereof be set aside on the ground that the court had no jurisdiction, which said motion was on April 6, 1878, sustained by said court upon the grounds stated and no other, and said order was set aside and dismissed without prejudice as to the Omaha and Southwestern Railroad Company.

Afterwards, to-wit, on November 29, 1880, a third order of sale was issued, directed to the sheriff of said Douglas county, commanding him to advertise and sell according to law the said property in satisfaction of said decree; and in pursuance of said order, on the 31st day of December, 1880, said property was offered for sale, and sold to appellee herein, who was plaintiff in the foreclosure proceedings, he being the highest and best bidder therefor, for \$2,000, that amount being not less than two-thirds of the appraised value of said property. Said sale was duly ratified and confirmed by said court, and a deed ordered, which was afterwards duly executed, acknowledged, and delivered, and was duly filed and recorded in the county clerk's office of said Douglas county.

On the 10th day of March, 1883, this action was commenced. It is alleged in the petition that nothing had been paid on the notes and mortgage except interest to December 1874, that no notice of any kind of the condemnation proceedings was ever served on plaintiff, although his mortgage was on record when defendant's petition to condemn was filed; and the condemnation money was paid into court and drawn out by the mortgagors. The prayer of the petition is a foreclosure of his mortgage as against the defendant railroad company. On the 30th day of March, 1883—after the commencement of this suit—plaintiff executed to John A. Dodge a power of attorney authorizing him to execute a quit-claim deed therefor. On the 18th day of April, 1883, said John Dodge executed a quit-claim deed to John I. Redick, said deed containing the following in addition to the usual recitals: "And also our right, title of the proceeds touching said lot, notes, and mortgage, the said Redick to litigate said suit out of his own expenses." On the 11th of April, 1885, a decree was entered finding for the plaintiff, and that there was due on the mortgage the sum of \$2,215, and decreeing it a first lien on said property, prior to any rights of defendant, and

ordering the property sold. Defendant appeals to this court.

It is claimed by appellant that plaintiff is not the real party in interest, and that this suit cannot be maintained by him, the real party being John I. Redick. Upon this question the evidence is that the suit was commenced before the execution of the deed to Redick, and he testifies in substance that at that time he had no interest in the property. That the date of the deed—the 18th day of April, 1873—was the date of the transaction. This testimony is not directly disputed or contradicted. A letter from plaintiff, written at his home in New York, dated March 19, 1883, to his brother in Omaha, who seems to have had charge of the matter at the time the suit was instituted, indicates quite clearly that plaintiff did not then know that the suit had been actually commenced; but there is no disaffirmance of the act of his brother shown after he had knowledge of what was done, and we must presume he affirmed it. The purchase of the interest of the plaintiff in the subject of the action would not prevent the prosecution of this suit to its termination in the name of the original plaintiff. Civil Code, Sec. 45. *Magenau & Co. v. Bell*, 13 Neb., 247.

The question as to the character of the title or right acquired by defendant—whether the fee or an easement—is, I think, unimportant in this case, as the result so far as the effect upon the property and the rights of plaintiff are concerned, would be substantially the same in either event; as, if the fee, the whole title of the mortgagor is transferred to defendant, and plaintiff's security destroyed—if affected at all—and, if an easement only, the whole of the mortgaged property has been occupied, and there is nothing remaining upon which the mortgage could operate with any effect. Believing the question to be an immaterial one in this cause, we express no opinion upon it.

The remaining questions are: Did the condemnation by

defendant of the lot in question as the property of Smith, the mortgagor—without notice to plaintiff, whose rights were of record, and of which defendant had constructive notice—and the payment of the condemnation money into court to be paid to Smith, divest plaintiff of his security, or rather of his right upon foreclosure to give possession of the property upon sale? and, if not, has his foreclosure of the mortgage and purchase of the property for a sum more than the amount of his decree, cancelled his demand and left him without a remedy?

Upon the first proposition we think the proceeding to condemn, being as it was without notice to plaintiff and, as he testifies, without his knowledge, could not affect his rights in the premises.

In Jones on Mortgages, section 708, it is said: "When the mortgaged property has been turned into money, or a claim for money in any way, as, for instance, by the taking of the property for public uses, or for the use of a corporation under authority of law, the rights of the mortgagee remain unaltered, and he is entitled to have the money in place of the land applied to the payment of his claim. Thus, if a street be laid out through land subject to a mortgage, although the damages be assessed to the mortgagor, the mortgagee is entitled to them as an equivalent for the land taken for the street." And thus the "damages awarded to a mortgagor for the right of way or other public improvement become a substitute for the premises taken, and the mortgage is a specific lien upon the fund." See also, *Brown v. Stewart*, 1 Md., Ch. 87. *Platt v. Bright*, 31 N. J. Eq., 81, and cases cited. Rorer on Railroads, 258.

By section ninety-five, *et seq.*, chapter 16, Compiled Statutes, it is provided in substance, among other things, that a railroad company may purchase real estate for its right of way; but if the owner refuses to grant the right of way, it may be taken and the value ascertained in the manner provided. This step can only be taken after ten days'

notice in writing to the owner. The company may pay to the county judge, for the use of the owner, the money found due by the commissioners appointed to ascertain the amount.

In *Gerrard v. R. R. Co.*, 14 Neb., 270, it is decided that the word "owner," as used in this statute, applies to any person having an interest in the estate.

Plaintiff not having been notified of the condemnation proceedings, his interest was not affected in any way thereby. *Pratt v. Bright, supra*, and cases there cited. *State Nat. Ry. Co. Pros., v. E. & A. R. R. Co.*, 36 N. J. Law, 181. *Wilson v. R. R. Co.*, 67 Me., 358.

By the statute above referred to, it is within the power of a railroad company to designate the owner of the real estate to be condemned to its use, and this designation by it is virtually notice to the county judge, with whom it deposits the money, to pay it out to the person named by it. The responsibility of making all persons entitled to the fund parties to the action rests with it, and it acts at its own peril when it fails to make interested persons, whose interests are shown by record, parties to the proceeding, in order that they may assert their right to the fund paid in. The right of eminent domain, or paramount ownership, is the exercise of the sovereign power of the state in the name of the corporation by whom the right is invoked. The constitution provides that "the property of no person shall be taken or damaged for public use without just compensation therefor." If mortgaged property can be literally destroyed, as in this case, without notice to the mortgagee, or any compensation to him, then the provision of the constitution above quoted would be without practical force, and would remain only in theory. This is not answered by the suggestion that the fee to the lot remains, upon which the mortgage can operate; for even if this be true, the fee is wholly worthless so far as present uses are concerned—the whole lot having been taken—and it would require a high degree of faith to enable one to look forward to the closing up of

the corporate existence of the railroad company, and the abandonment of its franchise, in the hope of enjoying the reversion. The principle contended for would apply in a case where the condemnation proceedings only covered a part of the real estate mortgaged; for in that case it would doubtless be the duty of the mortgagee to exhaust the remainder of the land before interfering with the right of way, but we think it would only apply in such a case.

By the record we are informed that defendant was not originally made a party to the foreclosure proceedings instituted by plaintiff, but after the second order of sale had been issued and returned, a petition was filed by plaintiff asking that the decree be set aside and he be allowed to amend his petition making new parties to the action. This was done, and the Omaha & Southwestern Railroad Company (defendant herein) was made a defendant. Subsequently it filed a motion to set aside the order vacating the decree, upon the ground that the court had no power nor jurisdiction to make the order. This motion was sustained, and the decree reinstated, the suit against defendant being dismissed without prejudice. It may therefore be said that defendant was in no sense a party to the foreclosure proceedings, and none of its rights have been affected by them, and the relation between it and plaintiff has not been changed unless by the purchase of the property by plaintiff.

It is the well settled law of this state, both by statute and by adjudication, that in a foreclosure proceeding the purchaser at a judicial sale, upon foreclosure of a mortgage, acquires the title of all the parties to the suit. Section 853, Civil Code. *Young v. Brand*, 15 Neb., 601. And we take it to be equally well settled that the rights of all persons not parties are wholly unaffected thereby. Therefore the foreclosure of the mortgage, terminating in the sale, could only affect the rights of the parties to the action. The purchase of the property by plaintiff was only the

purchase of the title of the mortgagor at the time of the execution of the mortgage, and his right to redeem (*Bank v. Wilson*, 4 Gilman, Ills., 61), leaving unaffected the after-acquired rights of defendant. Nor would the rights of the parties be changed by the fact of the amount of the bid by plaintiff being greater than that of his decree, since the money was not paid, and the purchase only had the effect of completing the foreclosure of the rights of the mortgagor. Therefore this action was properly brought, the defendant being a proper party to the foreclosure proceedings. *Merriman v. Hyde*, 9 Neb., 113. *Shirk v. Andrews*, 92 Ind., 509. *Curtis v. Gooding*, 99 Id., 45. *Bennett v. Gilman*, 4 Paige, 57. *McKinstry v. Mervin*, 8 Johnson's Ch., 465. *Wells v. Pierce*, 42 N. Y., 102. *Kennedy v. M. & St. P. R. R. Co.*, 22 Wis., 554.

There is no complaint as to the amount named in the decree as due plaintiff. Whether it should be the condemnation money with lawful interest from the date of its wrongful payment to the mortgagor, or the amount due on plaintiff's mortgage. That question is therefore not considered.

The decree of the district court is affirmed.

DECREE AFFIRMED.

THE other judges concur.

THOMAS SMITH, PLAINTIFF IN ERROR, V. THE STATE OF
NEBRASKA, DEFENDANT IN ERROR.

1. **Forgery.** To utter and publish an instrument alleged to have been forged, is to declare or assert, directly or indirectly, by words or actions, that it is good. Rule applied. *Folden v. The State*, 13 Neb., 328.
2. **The Evidence examined and Held,** Sufficient to sustain the verdict.

3. **Forgery: DELIVERY.** One B., a stranger in Omaha, met one T., who professed to have a large farm near St. Louis, and desired to employ B. to superintend it. While they were conversing a pretended freight agent appeared, who was introduced to B. by T. as such, and who demanded of T. the payment of a pretended freight bill of \$65. T., pretending he had not sufficient change to pay the bill, presented to B. a forged check on an Omaha bank for \$250, saying he could get the money on presentation, and asked him to cash it; *Held*, An uttering of the check, although it was not actually transferred to B.

ERROR to the district court for Douglas county. Tried below before NEVILLE J.

N. J. Burnham, for plaintiff in error, cited: 1 Whart. Crim. Law, 711. *Commonwealth v. Searle*, 2 Binney, 332. *People v. Rathbun*, 21 Wend., 509. *United States v. Carter*, 2 Cranch C. C., 243. *United States v. Mitchell*, 1 Bald., 366.

William Leese, attorney general, for the state.

REESE, J.

An information was presented to the district court by the district attorney, containing two counts, one for the crime of forging a check for \$250 on the United States National Bank of Omaha, the other for uttering and publishing as genuine the same check. Upon trial he was found guilty as charged in the second count of the information, and sentenced accordingly. He now prosecutes error to this court.

The principal, and in fact the only contention of plaintiff in error is, that the verdict of the jury is not sustained by sufficient evidence. The facts as testified to by the prosecuting witness were substantially as follows:

Plaintiff met Bromley, the prosecuting witness, in the city of Omaha, and asked him where he was going, and was informed by the witness that he was going to St.

Louis. Plaintiff said that was where he was going, that he lived three miles from that city, and suggested that they would go together. After some further conversation of a general nature they separated, but before doing so, plaintiff invited Bromley into a saloon to have a cigar, saying he did not drink. The cigar was accepted and Bromley went to his hotel to get his satchel, saying in response to a question from plaintiff, that he would be gone about half an hour. Plaintiff said he would wait until the return of Bromley. Bromley did not get his satchel, but went to a bridge-builder's office near the depot, where he hired to work at bridge building, that being his trade. After leaving the depot he started to purchase some necessary tools with which to carry on his work, and on the way he took occasion to examine as to the amount of money he had. About the time he was through with this, some one touched his shoulder to attract his attention, and upon looking round he saw plaintiff, who seems to have gone by the name of Thompson. Plaintiff asked Bromley where he was going, and was informed that he was going "up town." Plaintiff remarked that he was going in the same direction, and would accompany Bromley. After going a short distance plaintiff asked Bromley if he would not like to go to St. Louis and work for him taking care of his large 500-acre farm and the stock thereon, which was represented to be quite an establishment, etc., and proffering to provide a pass for Bromley to St. Louis. Bromley finally consented to go for the price offered. About this time they met another person, who called to plaintiff, saying: "Hello, Thompson." Plaintiff looked around and said: "Hold on, Bromley, there is the freight agent now; that is the man I am looking for. The person came up and was introduced to Bromley as Mr. Turner, the freight agent. Turner came up, shook hands with the witness, and informed plaintiff that "that freight bill" of his was \$65. Plaintiff said he knew it, and put his hand in his pocket,

taking out an envelope, opened it, saying he had a five hundred dollar bill, which he presented to Turner for him to change. Turner said he had not money enough to change the bill, when plaintiff returned it and presented the check in question, saying: "Here is something smaller, a two hundred and fifty dollar check." Turner produced some money, saying he had not a sufficient amount of change, but that the check was as good as so much gold. The check was returned to plaintiff, who held it up in front of Bromley and said: "You can cash that; you can get your money in ten or fifteen minutes at the bank." Bromley declined cashing the check, saying he had not the money, but gave plaintiff what he had—eleven dollars—and they separated, Bromley going to the depot to "keep an eye" on a "trunk and valuable package" until plaintiff arrived, which he failed to do, owing, perhaps, to the fact that no such trunk and package were there.

The sole question presented is, whether or not this testimony shows an uttering and publishing of the check in question. We think it does.

Greenleaf, in his work on Evidence, vol. 3, section 110, says: "The allegation of *uttering and publishing* is proved by evidence that the prisoner *offered* to pass the instrument to another, declaring or asserting, directly or indirectly, by words or actions, that it was *good*."

In *The People v. Caton*, 25 Mich., 390, Judge Cooley, in writing the opinion of the court, says: "To constitute an uttering it is not necessary that the forged instrument should have been actually received as genuine by the party upon whom the attempt to defraud is made. To utter a thing is to offer it, whether it be taken or not." See also *Folden v. The State*, 13 Neb., 330. To utter or publish as true and genuine a forged check, with the intent to defraud, is made criminal by section 145 of the criminal code.

Applying these rules to the testimony in the case at bar, we see no difficulty in finding sufficient testimony to sus-

tain the verdict. It is urged by plaintiff's counsel that simply *showing* the forged instrument, without an offer to pass it, is not "uttering." This is true, but in this case there was a clear attempt to pass it, and had Bromley been possessed of sufficient money to pay the face of the check, and disposed to part with it, it is evident that the assertion by the ready confederate, that it was as good as gold, would have been made available as an argument to Bromley to induce him to part with his money. But upon this point the testimony of Bromley is direct and positive. Plaintiff presented it to him and asked him if he could cash it, telling him he could get his money on it in fifteen minutes.

The check was payable to the order of Henry Marshall and was not indorsed. It is urged that this want of indorsement would prevent the uttering of the check. The *check* and not the indorsement is the alleged forgery. Such being the case the attempt to pass it was sufficient.

The verdict is sustained by sufficient evidence and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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| 31 | 846 |
| 20 | 288 |
| 43 | 731 |

NEBRASKA CITY, PLAINTIFF IN ERROR, V. ANNIE
RATHBONE, DEFENDANT IN ERROR.

Municipal Corporations: NEGLIGENCE. Where the testimony shows that there were accumulations of snow and ice on a sidewalk, in consequence of which the plaintiff fell and sustained severe injuries, the question whether the city was negligent in removing the obstruction is one of fact, to be determined by the jury from all the circumstances of the case.

ERROR to the district court for Otoe county. Tried below before HAYWARD, J.

John C. Watson, for plaintiff in error.

The mere slipperiness of a sidewalk, occasioned by ice and snow, not accumulated so as to cause an obstruction, is not ordinarily such a defect as will make the city liable for damages occasioned thereby. *Stanton v. Springfield*, 12 Allen, 566. *Nason v. Boston*, 14 Allen, 508. *Cook v. Milwaukee*, 24 Wis., 270. *Ward v. Jefferson, Id.*, 342. *Cook v. Milwaukee*, 27 Wis., 191. *Chicago v. McGiven*, 78 Ill., 347, 1875. See also *Grossenbach v. Milwaukee* (Wis.), 26 N. W. Rep., 182. *Broburg v. Des Moines* (Iowa), 19 N. W. Rep., 340. *McKeller v. Detroit* (Mich.), 23 N. W. Rep. *Battersby v. New York*, 7 Daly, 16. *Urquhart v. Ogdensbury*, 2 Amer. & Eng. Corp. Cas., 565 *et seq.* *Broburg v. Des Moines*, 4 Amer. & Eng. Corp. Cas., 627; S. C., 19 N. W. Rep., 340. *Chicago v. O'Brien*, 111 Ill., 532; S. C., 53 Amer. Rep., 640. *Hill v. Fon du Lac*, 53 Wis., 248; S. C., 14 N. W. Rep., 25. *Stilling v. Thorp*, 54 Wis., 537; S. C., 11 N. W. Rep., 906. *Cloughessey v. Waterbury*, 51 Conn., 405.

Frank T. Ransom, for defendant in error.

It is for the jury to determine how long a defect in a sidewalk must have existed to charge the city with constructive notice. *Sheel v. Appleton* (Wis.), 5 N. W. Rep., 27. *Colley v. Westbrook*, 57 Me., 181. *Logansport v. Justice*, 74 Ind., 378.

MAXWELL, CH. J.

This action was brought by the defendant in error against the plaintiff in the district court of Otoe county to recover for personal injuries sustained by her from falling on a

sidewalk in said city while said sidewalk was obstructed by snow and ice. A verdict was rendered in favor of the defendant in error and judgment was rendered thereon.

It is alleged in the petition that the defendant is a municipal corporation, a city of the second class duly organized under the laws of the state, and was such at the time of the accident hereinafter mentioned, and had full charge and control of the streets in said city.

That Main street is a public street in said city, duly laid, the grade thereof established, and is guttered and sidewalked, and is the principal street in said city.

That portion of said Main street, commencing with the line of the property thereon, and extending for a distance of twelve feet into and toward the center of the street, is set aside for sidewalks and sidewalk purposes, to accommodate persons traveling on foot on said street.

The west half of lot eleven, in block nine in said city, fronts upon said Main street and adjoins the line of said street on the north.

On the 3d day of January, 1885, and for a long time prior thereto, snow and ice had been allowed to accumulate upon the sidewalk in front of the said west half lot eleven in block 9, the said sidewalk being a part of said Main street, and the said accumulations of snow and ice had been allowed for such a length of time, and to such an extent, that the same formed obstructions thereon, and impeded travel over said sidewalk, ridges of snow and ice had been formed upon the said sidewalk, and rendered the said sidewalk dangerous and hazardous. The said formation of ice and snow, and the said obstructions had been allowed by defendant, and had been allowed and suffered to be and remain upon said sidewalk through the negligence of defendant, and the said sidewalk through the negligence of defendant had been allowed to become and remain dangerous to travelers passing over and across the said sidewalk.

On the said 3d day of January, the plaintiff was walking upon said Main street, to-wit, that portion thereof composing the said sidewalk and was using due care and caution, and entered upon the said dangerous sidewalk in front of the said west half of said lot eleven without being aware of the dangerous condition thereof.

By reason of the accumulation of ice and snow and the obstructions formed thereby, and without any fault or want of care on her part, plaintiff stepped and fell upon said sidewalk, in front of said west half of said lot eleven, and striking violently upon said ice and obstructions aforesaid, her arm was broken, her body was severely bruised, and she was injured internally, and as a result thereof she was confined to her bed for more than two months, and has been put to great trouble and expense for physician's and surgeon's services, and has suffered great pain and anguish, and has by reason of said injuries been rendered unable to do any manual labor, and unable to earn her living and sustain herself as she has heretofore been accustomed to do, to her damage in the sum of \$5,000.

She presented her claim for damages for said injuries, with a statement of the circumstances attending the same duly verified as required by law, to the defendant, and its mayor and city council, and they refused to allow the same, or to pay the said claim. Whereupon she prays for judgment against defendant for the sum of \$5,000 and costs of this action.

Thereafter the defendant filed an answer to said petition setting up the following defenses:

The defendant, in answer to the petition of the plaintiff, does not deny the allegations contained in the first, second, third and fourth paragraphs in said petition. Defendant denies each and every other allegation therein contained. Wherefore, defendants demand judgment for costs in this action expended.

A very large amount of testimony was taken in the case

which need not be noticed at length. It tends to show the following facts: That on the 8d of January, 1885, the plaintiff below was walking on a sidewalk on Main street in said city, at or near a place called Merit Parlor, and fell, breaking her arm and sustaining other severe injuries; that for several days prior to that time snow had been falling, with some sleet, and that the sidewalks were slippery and unsafe. All the snow that had fallen during the storm seems to have been permitted to remain on the sidewalk except as private persons may have removed the same from in front of their premises. The testimony is conflicting as to the depth of the snow on the sidewalk, some of the witnesses speaking of it as thin coating, while others say that in places near where the accident occurred it was from a foot to twenty inches deep—sufficient in any event to be termed an accumulation. Nebraska City is a city of the second class, and governed by the provisions of the act relating to such cities, section 77 of which provides that "The city council * * shall have the care, supervision and control of all public highways, bridges, streets, alleys, public squares, and commons within the city * and shall cause the same to be kept open and in repair and free from nuisances." Comp. Stat., Ch. 14. The testimony also shows that the city had endeavored to comply with the provisions of the statute by the passage of an ordinance for the construction, repair, and removal of obstructions from sidewalks.

The questions presented are: Do the petition and proof show that the city is liable?

In *Cook v. City of Milwaukee*, 24 Wis., 270, it was held that where snow and ice are permitted to remain upon a sidewalk in such an uneven or rounded form that one cannot walk over it, using due care, without danger of falling, the city or town will be liable to a person injured thereby; citing *Luther v. Worcester*, 97 Mass., 268. *Hutchins v.*

Boston, Id. 272. *Hull v. Lowell*, 10 Cush., 260. *Shea v. Lowell*, 8 Allen, 136. *Payne v. Lowell*, 10 Id., 147. *Providence v. Clapp*, 17 How., 164.

In *Cook v. Milwaukee*, it was held that the petition did not state a cause of action, the only defect complained of being that the walk over the stone was slippery because of the smooth surface of the snow and ice which had accumulated upon it. It was held that such a condition from such a cause was not an insufficiency for want of repair which would make the city liable under a statute like that of Wisconsin. The statute is not set out in the report, but it is stated in the brief of the attorney for the city in that case, "that no statute makes it the duty of the corporation or empowers it to keep the streets in repair or in a cleanly condition, or provides it with means to defray the expense of doing so." If that is a correct statement of the powers of the city of Milwaukee, they were much more restricted in that regard than are cities of the second class under our statute.

The case of *Congdon v. City of Norwich*, 37 Conn., 414, is somewhat analogous in its principal facts to the case under consideration, but the court sustained a judgment against the city in favor of the person injured. The court say (p. 419), "Accumulations of snow and ice may produce such a condition of the road as to cause it to be dangerous and defective, and in each particular case of alleged defect from such cause, the question will depend on an inquiry of fact, whether the road was in a reasonably safe condition, and whether those who were bound to keep the road in repair are justly chargeable with negligence and want of reasonable care in relation to it."

The question whether a sidewalk was defective or in an unsafe condition is one of fact and not of law. While the courts generally hold that the mere fact that a sidewalk is slippery will not render the corporation liable for an injury occasioned to a person by falling on such walk in

consequence of such condition of the walk, yet when there are accumulations of snow and ice on the sidewalks the city may be liable if it has been guilty of negligence in not removing the same.

In *Williams v. Clinton*, 28 Conn., 266, it was held that the question of the plaintiff's negligence was one of fact. The verdict is clearly sustained by the evidence, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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| 20 | 294 |
| 24 | 487 |
| 20 | 294 |
| 25 | 287 |
| 20 | 294 |
| 42 | 684 |
| 20 | 294 |
| 44 | 770 |
| 20 | 294 |
| 45 | 797 |
| 20 | 294 |
| 49 | 749 |
| 52 | 816 |
| 20 | 294 |
| 58 | 287 |
| 20 | 294 |
| 60 | 287 |

THE BLUE VALLEY BANK, PLAINTIFF IN ERROR, V.
CLEMENT BANE & CO. ET AL., DEFENDANTS IN
ERROR.

Replevin: GIST OF ACTION. The action of replevin, or, as it is sometimes called, the action for the delivery of personal property, is a statutory proceeding, in which the right of the plaintiff to the immediate possession of any of the chattels involved in the suit, and their wrongful detention by the defendant, constitute the gist of the action. The pleadings, evidence, and judgment should be confined to these points, and questions necessary to their elucidation.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Hardy & McCandless and *Griggs & Rinaker*, for plaintiff in error.

T. D. & J. E. Cobbe, *Hazlett & Bates*, and *Burke & Prout*, for defendants in error.

NOTE.—Gist of action is unlawful detention of property. *Haggard v. Wallen*, 6 Neb., 272. *Moore v. Kepner*, 7 Id., 294. Right of property and possession thereof only can be tried. *Gillespie v. Brown & Ryan Bros.*, 16 Neb., 462.—REP.

COBB, J.

This cause was heard at a former term of this court and an opinion filed and published in the N. W. R., vol. 26, p. 583.* A motion for a re-argument was made and allowed, and the cause re-argued and again submitted at the present term.

A brief re-statement of the facts of the case may not be out of place.

Tessier was the general owner of a stock of goods and was in debt. The bank was the owner and holder of two chattel mortgages on said stock of goods to secure debts which were past due. For the purpose of foreclosing said mortgages the bank seized and took possession of the stock of goods. At about this point of time the several firms of Clement Bane & Co., Reed, Jones & Co., Lockwood, Englehart & Co., Mack, Stadler & Co., and V. A. Crowley, general creditors of said Tessier, severally sued out writs of attachment against him, placed them in the hands of N. Herron, sheriff, and caused him to levy upon the said stock of goods. Thereupon the bank commenced this action of replevin, and such action was had thereon that the said stock of goods were re-delivered to it.

It appears that that the above named several firms of attaching creditors were represented by as many different firms of attorneys, each of whom, after the first, filed what purport to be amended answers of defendant Herron, in the nature of special pleas, setting up the attachment of the clients of the attorney, filing such amended answers respectively as a defense to said action of replevin in their behalf. No little confusion in the presentation of the case is attributable to this practice, and I refer to it chiefly for the purpose of saying that it is quite established as the

* Original opinion withheld from publication in regular series of reports by direction of its writer.—REP.

law under our statutes and system of practice, that a general denial, in an action of replevin, puts in issue every material allegation of the petition, and under it the defendant may give evidence of any special matter amounting to a defense to the plaintiff's cause of action. See *Richardson v. Steele*, 9 Neb., 483, and cases there cited. Also *Cool v. Roche*, 15 Neb., 24.

There was a trial to the court (a jury being waived) which found and rendered judgment as follows: "The court finds that at the commencement of this action the plaintiff was entitled to the possession of the property replevied by virtue of two chattel mortgages, and by virtue of said chattel mortgages the plaintiff had a special property in the said property replevied in this action of the value of the amounts due on the notes secured by said mortgages, to-wit, \$——, and that the value of the property replevied was the said amount due on said mortgages, together with the further sum of \$1,821, the value of the balance after satisfying said mortgages, making the whole value of the property \$——. The court further finds that the plaintiff has disposed of all of the said goods and made a return thereof impossible, and that plaintiff out of the proceeds of said goods has satisfied the said two mortgages, and after paying the same, the balance of said goods was worth \$1,821, balance plaintiff should have turned over to defendants, and that defendants are entitled to judgment for said sum of \$1,821 and interest. That damages of plaintiff for the wrongful detention is \$5, and should draw interest at 7 per cent. from the commencement of this action, now amounting to \$5.70. That said \$1,821 draw interest from June 1, 1883, and now amounts to \$2,075.94 as the amount of judgment in favor of defendants. * * * It is therefore ordered, adjudged and decreed by the court that the mortgages in favor of plaintiff on the said property in controversy be and the same hereby are satisfied in full, and that the de-

defendants have and recover of and from the plaintiff the said sum of \$2,075.74 so as aforesaid found due, and that the plaintiff have and recover of and from the defendant the said sum of \$5.70, its damages herein found due, and that the defendants pay the costs of this action, taxed at \$——," etc.

After the above finding was made by the court, and before the rendition of the judgment, motions for a new trial were made respectively by the plaintiffs and by Clement Bane & Co., both of which were overruled. It should be stated that before the trial the several firms of attaching creditors hereinbefore named were by order of the court, upon their joint application, substituted for the said N. Herron, sheriff, as defendants. The cause is brought to this court on error by the plaintiff as well as by defendant Clement Bane & Co.

The bank assigns eight grounds of error, five of which are for the admission of improper evidence. The sixth is for error in the rendition of judgment against the plaintiff for the overplus remaining after the payment of said mortgages, and after the same had been taken away from the plaintiff by order of the county court on plaintiff's answer as garnishee, and after \$500 worth of said surplus had been set aside to said Tessier as his exemption by order of the county court and delivered to him. The other two are formal.

The defendants, Clement Bane & Co., assign seven grounds of error, four of which are for the admission of improper evidence and three for error in the findings and judgment.

As to the errors assigned by either party for the admission of improper evidence, it is scarcely necessary to repeat what has been so often said in this court, that in a cause tried to the court without the intervention of a jury, errors of that character cannot be considered. The case will then necessarily turn upon the point as to whether the

judgment is sustained by the evidence. This point is raised by the petition in error on either side.

As to whether the evidence is sufficient to sustain that part of the judgment which is in favor of the plaintiff in the court below, that at the time of the commencement of this action the plaintiff was entitled to the possession of the property replevied, there can be no question. Indeed it is substantially admitted by the answer of the defendant sheriff, and was sufficiently proved by the presentation and proof of the mortgage executed by Tessier to the bank. Whether the mortgage executed by Tessier to Mrs. Ada W. Fenton was properly admitted in evidence is, as above stated, a question which cannot be enquired into here. As to whether it was properly taken into consideration by the court in coming to the conclusion which it expressed in declaring the amount of the plaintiff's lien on the goods is, as I view the case, quite immaterial. The question before the district court was whether the plaintiff had at the date of the commencement of the action a special ownership in the property replevied, and was entitled to the immediate possession thereof. Code, § 182. Wells on Repl., § 94. The chattel mortgage from Tessier to the bank, unattacked as it was, and containing the stipulations and provisions which it does, was sufficient evidence to sustain the findings and judgment in so far as they are favorable to the plaintiff in the court below. Counsel for defendant (in the court below) say in the brief on re-argument: "There being no question as to the correctness of the finding upon which the judgment of the district court was based, this brief will discuss the one question as to the power of the court to render judgment in favor of the defendant in a replevin suit, for so much of the property replevied, or the value thereof in case a return cannot be had, as remained in the hands of the mortgagee plaintiff after the satisfaction of their mortgages and costs." Counsel then cites §§ 41 and 190 of the code, also a part of § 191, and

continues: "Does not the language here clearly indicate that it was the intention of the legislature, in enacting this law, that the rights of the several parties as to the property involved in the replevin suit should be determined in the one action?"

Section 41 relates to actions under the code generally, and provides that "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." Conceding, for the purpose of disposing of counsel's question, that the above section applies to an action of replevin, let us stop to say that the question involved in the case at bar is, as above stated, whether the plaintiff, at the date of the commencement of the action, had a special property in the goods replevied and was entitled to the immediate possession thereof. The question of the general ownership of the property was not involved nor raised by any pleading in the case.

The action of replevin, or, as it is, I think, more appropriately termed in our state, the action for the delivery of personal property, is a statutory action, every proceeding in which is specially provided for by statute. It cannot be changed into a suit in equity, nor into one for money had and received; neither does off-set or counter-claim lie against it.

The statute prescribes the judgment to be entered upon the trial in this action in whatever contingency, unless it may be in that supposed by counsel in the brief, where the property replevied consists of three horses, all of which had been delivered to the plaintiff. In such case although not expressly provided for by statute, it is obvious, I think, that the property being not only severable, but already severed, in case of a finding for the plaintiff as to two of the animals, and for the defendant as to the third one, the judgment would be for the plaintiff as to the two,

and for the defendant as to the one. Each judgment would be an entirety as to itself as to the retention or return of the property as found, for the value of the property in case a return could not be had, and other incidents. But in the case at bar the mortgage lien attached to each yard of cloth and each pair of shoes constituting the stock of goods replevied, and the finding of the court is to the effect that the plaintiff in the court below was entitled to the possession of every article. The statute provides that upon such a finding adequate damages shall be assessed to the plaintiff for the illegal detention of the property for which, with costs of suit, judgment shall be rendered. Code, § 192. It is scarcely necessary to add that the concluding word "defendant" in the section just cited is construed and held to mean plaintiff.

I have carefully examined the several cases cited by counsel from our own reports, to-wit: *Mathews v. Smith & Crittenden*, 13 Neb., 178. *Hollingsworth v. Fitzgerald*, 16 Id., 492. *Burnham v. Doolittle*, 14 Id., 214. *Cool v. Roche, Hall & Ray*, 15 Id., 24, and *Liningier v. Herron*, 18 Id., 452. Most of these were cases in garnishment, and none of them in point to the questions raised in the case at bar. The principal question here involved might have been raised in the case of *Mathews v. Smith & Crittenden*, *supra*, but was not; that case turning on the validity of the mortgage from Beatty & Woods to S. & C., containing, as it did, a power to sell the goods mortgaged at private sale. The point involved in this case was partially raised by counsel for an intervening creditor, but not in a manner to warrant the court in considering it, and it was expressly avoided. See last clause of the opinion.

It appears from the record that summonses in garnishment were served on the plaintiff on the part of the several substituted defendants in the case at bar. These proceedings constituted as many suits at law against the plaintiff Drake on Att., § 452. These suits are still pending so

State v. Emery.

far as appears, and I know of no reason why the questions in which the rights of the parties are involved may not be there fully litigated and settled.

I reach the conclusion that that part of the findings of the district court which finds that at the commencement of this action the plaintiff was entitled to the possession of the property replevied, and the damages of the plaintiff for their wrongful detention is \$5.70, also so much of the judgment of said court as adjudges that the plaintiff have and recover of the defendant the sum of five dollars and seventy cents, his damages therein found due, and that the defendant pay the costs of said action should be affirmed, and that all other findings and judgments of said court in said cause should be reversed. The cause will not be remanded, no further action on the part of the district court being deemed necessary.

JUDGMENT ACCORDINGLY.

The other judges concur.

THE STATE OF NEBRASKA, EX REL. W. A. WAGNER, v.
G. G. EMERY.

Cities of Second Class: VOTING PLACES WHERE COUNTY IS UNDER TOWNSHIP ORGANIZATION. The city of B., having over five thousand inhabitants, was divided into four wards. But the county board had never caused the precincts or voting districts to conform in their boundaries to the ward lines. G. county, in which the city is situated, is under township organization. In an application for a mandamus to compel the county clerk to issue and deliver to the city clerk of B. three election notices for each ward in the city it was *Held*, that as such precincts or voting districts had not been established by the county board, the writ should be denied.

ORIGINAL application for mandamus.

Pemberton & Bush, for relator.

Cobbey & Summers, for respondent.

REESE, J.

This is an application for a mandamus to compel the respondent, who is the county clerk of Gage county, to issue and deliver to the city clerk of the city of Beatrice three election notices for each of the four wards in the city. Respondent has declined doing this, but has issued three notices treating the city as one voting precinct or district.

The contention of relator is that by the division of the city into wards by the city council, each ward is made a voting district for the purposes of the general election to be held on Tuesday succeeding the first Monday in November. In support of this we are referred to article two of chapter fourteen of the Compiled Statutes, in which the rights and powers of "Cities of the second class over 5,000 inhabitants" are defined, and in which the wards of the city are declared to be election districts, etc. It is very evident that the article referred to treats almost solely of the matter of municipal, or city, government. A few exceptions may be found, but we know of none which are applicable to this case, Gage county being under township organization.

It is conceded that the county board has never taken action in the matter. In counties not under township organization it is made the duty of the board of county commissioners to divide the county into convenient precincts (Section 60, chapter 18), and in case the county contains a city of over 5,000 inhabitants which is divided into wards, the precinct lines must be made to correspond with the ward boundaries. Sec. 9, chapter 14.

When a county adopts township organization, each voting precinct shall, for temporary purposes, be treated as a township—section 4, chapter 18—and at the first meeting of the board they must proceed to divide the county into townships. Sec. 5, Id. But no city or village of over 1,000 inhabitants shall be included in the corporate limits of any township. Such territory shall constitute a town. Id. In wards of cities of the first and second class whose limits are co-extensive with precincts, the electors shall only choose supervisors, assessors, and judges and clerks of election at first election. Sec. 4, Id.

It is, perhaps, the duty of county boards in all cases, certainly when not under township organization, to create election districts to suit the convenience of the voters at a general election. In the case at bar it has not been done either before or after the adoption of township organization. If in cases where township organization has been adopted there is no authority of law for such action by the county board, then it is serious defect in the law, and one which should be remedied by the law-making power.

For the purposes of this case it is sufficient to know such action has not been taken, and the writ is therefore denied.

WRIT DENIED.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. JOHN W. THOMAS,
v. FRANK P. MCCUTCHEON.

Criminal Law: COMPLAINT BY OFFICER: SECURITY FOR COSTS.

Section 287 of the Criminal Code, which authorizes magistrates to require a complainant, in a prosecution for a misdemeanor, to become liable and give security for costs, has no reference to prosecutions instituted by prosecuting officers when acting in the discharge of a duty imposed upon them by law; and in such case, when a complaint is presented to a police judge of a city by the marshal, it is the duty of the police judge to issue his warrant, and in case of a refusal, mandamus will lie to compel action.

ORIGINAL application for mandamus.

Bell & Sornberger and Good & Good, for relator.

J. R. Gilkerson, for respondent.

REESE, J.

This is an application to this court, in the exercise of its original jurisdiction, for a peremptory writ of mandamus to the respondent, the police judge of the city of Wahoo, requiring him to issue a warrant of arrest in a criminal proceeding for the violation of a city ordinance.

There being no answer to the petition for the writ, the fact therein alleged must be taken as true; and from this petition it appears that relator is the marshal of said city, and that by the ordinances thereof it is made his duty to complain against and prosecute all persons violating the city ordinances. In obedience to this law he presented to respondent a complaint in writing, charging one Joseph Ledvina with the unlawful sale of intoxicating liquors, and requested the issuance of a warrant for his apprehension. Respondent refused to take action in the matter unless relator would become responsible for the costs in

the case and would furnish security therefor. This refusal being persisted in, the writ of mandamus is sought to compel action.

Respondent seeks to justify his refusal under the provisions of section 287 of the criminal code. This action provides that "when the offense charged is a misdemeanor, the magistrate, before issuing the warrant, may, at his discretion, require the complainant to acknowledge himself responsible for costs in case the complaint shall be dismissed, which acknowledgment of security for costs shall be entered on the docket, and the magistrate on dismissal may, if in his opinion the complaint was without probable cause, enter a judgment against such complainant for costs made thereon. And in case said magistrate shall deem such complainant wholly irresponsible, such magistrate may, in his discretion, refuse to issue any warrant unless the complainant procure some responsible security, to the satisfaction of such magistrate, for said costs in case of such dismissal; and said security shall acknowledge himself so bound, and the magistrate shall enter it on his docket."

The question here presented is, does this section include cases like the one referred to in this case, where the making of the complaint is an official duty specially imposed by law? We think not. A fundamental rule for the construction of statutes is to consider the mischief and the remedy, and construe the statute with reference thereto. The mischief to be corrected is the filing of complaints by private individuals without sufficient cause and from improper motives, and by this means occupying the time of the officers and witnesses when the interests of the community will not be subserved nor the law vindicated, and without any one being responsible for the costs created by the prosecution. The remedy is to require such complainants to pay the costs. But no presumption can arise that an officer acting under oath and in the discharge of official duty, will institute such proceedings. True, his prosecutions may

fail, but it cannot be said, as matter of law, nor by virtue of any judicial discretion, that his prosecutions are without probable cause.

Again, the highest considerations of public policy would require such a construction to be given to the section under consideration as would exempt public officers from its provisions.

In *The State, ex rel., v. Cumings*, 17 Neb., 311, a mandamus was issued to compel the marshal of the city of Omaha to enter complaint against liquor sellers because it was made his special duty, by ordinance, to do so. It would be an anomaly indeed to say that the police judge, by the exercise of a "discretion" could, by the course pursued in this case, effectually block the wheels of justice and render city ordinances nugatory in requiring officers of as high rank as himself to secure costs. Such a course, if sanctioned by law and persisted in by police magistrates, would drive out of office every conscientious marshal and policeman in the state, for no one would or could undertake to enforce the law and at the same time guarantee the payment of all costs made by his prosecutions. If the contention of respondent is the correct rule, it would not stop with police officers. The same "discretion" could be made available in cases of prosecuting attorneys in the discharge of their duties. It would seem that the mere statement of the proposition would furnish its own refutation. Such a construction of the law would be unreasonable.

We are of the unanimous opinion that the section above quoted can have no application to a prosecution instituted by a prosecuting officer when acting in the line of official duty.

Section twenty-two of chapter fourteen, Compiled Statutes, 1886, provides that "The police judge shall have exclusive jurisdiction to hear and determine all offenses against the ordinances of the city, and jurisdiction concur-

Marshall v. Roe.

rent with that which is or may be conferred upon justices of the peace, of misdemeanors under the laws of the state arising within the limits of the city," etc.

Section twenty-three provides that "whenever complaint shall be made to the police judge on oath or affirmation of any person that an offense has been committed, of which the police judge has jurisdiction, said judge shall forthwith issue his warrant for the arrest of the offender," etc.

It is therefore the duty of respondent to issue the warrant demanded, and the writ requiring such action is allowed.

WRIT AWARDED.

THE other judges concur.

JOHN L. MARSHALL, PLAINTIFF AND APPELLEE, V. J.
PHIPPS ROE, DEFENDANT AND APPELLANT.

The Evidence examined and Held, to support the decree of the district court.

APPEAL from the district court of Douglas county.
Heard below before NEVILLE, J.

O. H. Ballou, for appellant.

R. W. Patrick, and *J. L. Webster*, for appellee.

REESE, J.

This action was instituted to foreclose a real estate mortgage given to secure the payment of a promissory note for the sum of \$3,000 executed by defendant to plaintiff, and on which was endorsed a payment of \$1,052.78. The answer of defendant contains, as its principal averments of defense, that at the time of the execution of the note

and mortgage declared on, a certain contemporaneous agreement in writing was made by the parties whereby it was intended to limit the terms of the note by prescribing the method of payment. The agreement is set out at length in the answer, but need not be here copied. The substance is, that the parties enter into a partnership for the purpose of buying, feeding and selling sheep. Plaintiff put into the business the sum of \$6,000. For one half of this sum—\$3,000—defendant executed the note and mortgage in question. It was further agreed that plaintiff should retain the proceeds of sales of sheep until he should be reimbursed the said \$3,000 and its interest at eight per cent, and until he should be reimbursed his share of the original advance of money and any other sums he might advance during the existence of the partnership; one half of the proceeds of sales of sheep by plaintiff to be retained by him and first applied on the note until it should be paid.

Upon a trial of the cause the court found in favor of the plaintiff and rendered a decree of foreclosure. From this decree defendant appeals. The principal contention of appellant is that the decree is not sustained by sufficient evidence.

In our examination of the case we must be governed by the repeated holdings of this court, that where there is a conflict in the testimony the decision of the trial court will not be reversed unless clearly and manifestly wrong. Therefore, in all matters which are vital and material, where the testimony is evenly divided, the decision must be upheld.

The testimony shows that the partnership was entered into and the business carried on substantially as agreed, and that other moneys were borrowed and expenses incurred which were paid out of the partnership assets by plaintiff before any appropriation was made to the payment of the note in question.

We have carefully examined all the testimony in the

Marshall v. Roe.

case, and can find no agreement made subsequent to the execution of the written contract by which its terms were changed as to the mode of payment of the note, and therefore conclude that the trial court found no such change to have been made. It does appear from the testimony, however, that the proceeds of the sales of sheep were not first applied to the payment of this note, as agreed, but that they were applied to the payment of other debts contracted by the firm subsequent to the making of the note and mortgage; and that this application was made by plaintiff, but of which defendant had knowledge and in some instances contributed thereto himself, although, perhaps, acting under the instructions of plaintiff.

We think the decision in this case must turn upon the effect of the actions of defendant in the final closing up of the business affairs of the firm. There was evidence by which the trial court would be justified in finding that after the property had, substantially, all been disposed of, there was a final adjustment of the financial matters between the parties, and that defendant ratified all the acts of plaintiff in appropriating the money of the firm to the payment of its debts. It appears that in an examination of the accounts by the parties, presented by plaintiff, a general balance was struck, and there was found to be \$2,105.56 on hand in the possession of plaintiff. In their book of accounts the following entry, to the credit of plaintiff, occurs :

"By cash turned into firm and divided bet. partners and Roe's $\frac{1}{2}$ thereof, \$1,052.78, endorsed upon his note, favor Mr. Marshall for sum of \$3,000 given June 6, 1883."

Also :

"Memoranda, assets undivided :

"Neb. Nat. Bank, cash.....\$8.22

"Left with Mosher—

"1 Bay Mare, 1 Lumber Wagon,

"1 Cook Stove and Furniture,

"1 Pump, 3 Pans."

These entries, and the endorsement of the credit of \$1,052.78 on the note in suit; were all made by defendant in his own handwriting, and were made after the sheep had all been sold and accounted for and the appropriations of the proceeds made.

Was this not a ratification by defendant of all that had been done by plaintiff, and of which defendant had knowledge? We think it was. The money had been paid upon the indebtedness of the firm which, unaffected by the contract of agreement, was the proper appropriation, for it was a debt of defendant as much as the one here in question. The obligation to pay was the same. Had the appropriation been made without the knowledge or consent of defendant, and without his subsequent approval, the result might have been different; but when he has received the benefit of the partnership fund applied to the payment of the firm indebtedness, and so far approved it as to balance up the account and apply the remainder to the payment in part of his note, he will be treated as having ratified all the acts of plaintiff and will be bound thereby.

It is true that the explanation of these acts of defendant might, and probably should, have convinced the trial court that he should not be held as adopting the course pursued by plaintiff, but of this the trial court was the judge.

It follows that the decree of the district court must be affirmed.

DECREE AFFIRMED.

THE other judges concur.

WILLIAM H. GARRISON, PLAINTIFF IN ERROR, V. C.
AULTMAN & CO., ET AL., DEFENDANTS IN ERROR.

1. **Judgment: REVIVOR: PRESUMPTION OF PAYMENT.** In a proceeding to revive a judgment in the county court, where the judgment debtor on an order to show cause, why the judgment shall not be revived for such cause, shows by affidavit that the judgment has been paid and satisfied, it is error for the county court to render final order of revivor without hearing testimony as to such payment or satisfaction. There being a presumption in favor of such payment and satisfaction, the burden of proof is on the judgment plaintiff to show that the judgment is unsatisfied.
2. ———: ———: **JURISDICTION OF COUNTY COURT.** When the transcript of a judgment rendered in a county court is filed in the district court of the same county, all proceedings should thereafter be had in such district court; but in the absence of a statute prohibiting the court in which the judgment was rendered from proceeding further in the case, a judgment of revivor rendered in such court will be valid. *Dennis v. Omaha Nat. Bank*, 19 Neb., 675. The county court possessing such jurisdiction, it is not error to exercise it.

ERROR to the district court for Fillmore county. Tried below before MORRIS, J.

J. W. Eller and Ryan Bros., for plaintiff in error.

J. P. Maule and W. V. Fifield, for defendants in error.

REESE, J.

Defendants in error instituted a proceeding in the county court to revive a judgment obtained by them against plaintiff in error, and which had become dormant. The order of revivor was entered. This was affirmed on error to the district court. Plaintiff in error prosecutes error to this court.

A number of questions are presented, but we will notice but two, as they must control our decision.

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| 20 | 311 |
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The conditional order of revivor was made by the county court, and notice was given plaintiff in error to show cause why the revivor should not be made absolute. On the appointed day he appeared and made his showing under oath, the 3d, 4th and 5th paragraphs of which were as follows:

"3rd.—Affiant says that on the 8th day of January, 1876, the said C. Aultman & Co. procured and caused to be filed in the office of the clerk of the district court of Fillmore county, Nebraska, a transcript of the said judgment, which is now sought to be revived, and that said transcript was then and there duly filed by the clerk of said court, and entered upon the judgment and execution docket of said court, together with the amount of said judgment and the time of filing the said transcript, and thereby said judgment was transferred to the said district court, and affiant under advice of counsel avers that on and after filing the said transcript and causing the same to be entered upon the record of said district court as aforesaid, the county court was thereby divested of all jurisdiction in respect to the subject matter out of which the judgment arose and of the persons against whom the judgment was rendered. Affiant therefore alleges that the county court has no jurisdiction to revive said judgment, or to do or perform any act relating to said judgment in any manner or form whatever, wherefore this court has no jurisdiction to revive said judgment.

"4th.—Affiant further says that after the filing of said transcript of the said judgment in the said district court as aforesaid, and the said judgment had been by the clerk of said court entered upon the judgment and execution docket as aforesaid, said C. Aultman & Co. contracted and agreed with the said James E. McClellan to release the said judgment so transcribed, and the lien of said judgment upon his real estate, and take in consideration thereof money and notes of the said J. E. McClellan and the said C.

Aultman & Co., in consideration of certain money and notes executed with security and delivered by the said James E. McClellan to the amount and value of said judgment, did release the said judgment as transcribed as aforesaid and did release the lien of said judgment upon the real estate of the said James E. McClellan, whereby the said judgment in the said district court was fully released and satisfied. That said arrangements were made and executed without the knowledge or approval of affiant.

"That said James E. McClellan was, at the time said notes and money were paid and delivered to C. Aultman & Co., solvent, and his property was subject to the satisfaction of said judgment.

"That said James E. McClellan is now wholly insolvent, and that if said judgment should be revived, this affiant would be greatly damaged by reason of the acts of the said C. Aultman & Co.

"Wherefore this court has no jurisdiction to revive said judgment.

"5th.—That said judgment in the district court has been fully paid and satisfied, and the said C. Aultman & Co. have taken from the files of the court the notes upon which said judgment was based, and now hold the same.

"Wherefore this court has no authority or jurisdiction to revive said judgment."

To this a reply was filed, admitting the filing of the transcript on the 8th day of January, 1876, as alleged, but averring that no execution had been issued thereon, and that on the 30th day of June, 1881, the transcript was withdrawn from the district court records, and denying all the other allegations contained in the answer or showing against the revivor.

It will be seen by this that the question of the payment and satisfaction of the judgment was directly presented. But the county court, without hearing any proof, revived the judgment. In this there was error.

In *Wright v. Sweet*, 10 Neb., 190, Judge COBB, in writing the opinion of the court, says: "The lapse of five years raises the presumption of payment, not that the judgment was never entered, nor that it was erroneous or obtained by fraud, or of anything else but payment."

This presumption of payment having existed as to the judgment sought to be revived, it is clear that the burden of proof was on defendant in error to remove it before any proof was required upon the part of plaintiff in error. This presumption was rendered stronger by reason of the admitted fact of the withdrawal of the transcript from the files of the district court so long after its filing as to repel any suggestion of a mistake in filing it.

The question as to the jurisdiction of the county court to revive its own judgments after a transcript had been filed in the district court was before this court in *Dennis v. The Omaha Nat. Bank*, 19 Neb., 675; and it was there held that the filing of a transcript in the office of the clerk of the district court did not destroy the jurisdiction of the county court to revive the judgment. While, as suggested in that case, it would seem much better to proceed to a revivor in the district court, when a transcript has been filed therein, yet, the jurisdiction of the county court not having been taken away by the statute, it still remains.

For the reason that the issue of payment was not tried by the county court, the judgments of the district and county courts are reversed and the cause is remanded to the district court for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

CHARLES BANKS, APPELLANT, v. G. M. HITCHCOCK,
APPELLEE.

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| 20 | 315 |
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The taking of a stay of execution by defendant in an action in which a judgment has been rendered, is a waiver of the right to apply for a new trial, and by so doing such defendant would be estopped to attack the judgment in any manner. Following *Miller v. Hyers*, 11 Neb., 474.

APPEAL from Douglas county district court. Heard below before WAKELEY, J.

George W. Doane, for appellant.

George B. Lake, for appellee.

REESE, J.

This is an appeal from an order of the district court denying a new trial. The proceeding was instituted by petition and summons under the provisions of section 318 of the civil code. Appellant has filed no brief and the cause is submitted upon the brief of appellee.

A number of questions are discussed, but we think it necessary to notice but one, as it is decisive of the case.

It appears from the record that after the original judgment was rendered the appellant filed with the clerk of the district court a request for a stay of execution, and execution was thereupon stayed. The stay was taken by appellant's attorney, with full power to act, as shown by the proof.

This, by the holding of this court in *Miller v. Hyers*, 11 Neb., 474, is a waiver of the right of a defendant to attack the stayed judgment in any manner.

The judgment of the district court in refusing the new trial is therefore affirmed.

JUDGMENT AFFIRMED.

The other judges concur.

SAMUEL H. STEELE, APPELLANT, V. D. P. HAYNES ET
AL., APPELLEES.

1. **Appeal: FAILURE TO FILE ABSTRACT AND BRIEF.** An appeal will not be dismissed for the mere failure of the appellant to file an abstract and brief within the time required by statute, unless it is apparent that the neglect is wilful, or that the appeal was not taken in good faith.
2. —: **LEAVE GIVEN TO APPELLANT TO FILE PETITION IN ERROR.** Where the same relief can be given either by an appeal or proceedings in error, a transcript filed in the supreme court for an appeal, more than six months but less than one year from the rendition of the decree in the court below, will not be stricken from the files, but the appellant will have leave upon such terms as may be just to file a petition in error. On the failure to comply with the order to file the petition in error, the appeal will be dismissed.
3. **Judgment: FINAL ORDER.** An order before judgment dissolving a temporary injunction is not a final order and not appealable; but an order overruling an application to set aside a default and for leave to answer may be appealed or reviewed on error.

APPEAL from Butler county district court. Heard below before POST, J.

Samuel H. Steele, pro se.

Charles E. Magoon, for appellee.

MAXWELL, CH. J.

In March, 1885, a petition was filed in the district court of Butler county to foreclose a certain chattel mortgage executed by the defendant Haynes to one J. Robert Williams, upon personal property of said Haynes, to secure a promissory note for the sum of two hundred and sixty dollars and thirty cents. The following is a copy of said note:

Steele v. Haynes.

"\$260.30. DAVID CITY, NEBRASKA, May 24, 1884.

"Aug. 24th after date, for value received, I promise to pay to the order of J. Robt. Williams two hundred and sixty and 30-100th dollars at the office of Westover & Williams, David City, Nebraska, with interest from maturity until paid. The undersigned further agrees to pay as liquidated damages if action is brought herein.

"No. 1,630. (Signed) D. P. HAYNES."

It is alleged that on the same day the plaintiff purchased said note and mortgage of said Williams, and they were then duly endorsed and delivered. On August 24, 1884, Haynes executed a second note to Williams for the sum of two hundred and eighty-four and 30-100th dollars, and a second chattel mortgage upon substantially the same property to secure said note. This note and mortgage were transferred to one C. S. Hooper.

On the 2d day of June, 1885, default was taken against Haynes, and on the 5th of that month a decree of foreclosure was rendered. On the same day on which the decree was rendered, the defendant Haynes filed a motion supported by affidavits and accompanied by an answer to open the default. This motion, on the 13th day of the same month, was overruled. Afterwards, an order of sale being issued, and the mortgaged property about to be sold, an order restraining the sale was obtained, which order, on the 27th of August, 1885, was dissolved. The following certificate is attached to the bill of exceptions:

"The foregoing is all the evidence offered or given by either party on the hearing of said application to vacate and set aside the judgment and default heretofore entered in this case, and on the application of the defendant D. P. Haynes this bill of exceptions is allowed by me and ordered to be made a part of the record in this case.

"A. M. Post,
Judge."

"Oct. 17, 1885.

Also, the following at the commencement of the bill of exceptions:

"In the district court of the county of Butler, State of Nebraska :

"Samuel H. Steele,

v.

"D. P. Haynes and C. C. Hooper. }

" BILL OF EXCEPTIONS.

"Be it remembered that on the hearing of the application to open the judgment and set aside the default hereto(fore) entered in this cause, heard in the district court of Butler county at the———term, 1885, thereof, to-wit, the 13th day of August, 1885, the applicant, D. P. Haynes, submitted the affidavits following in support of said application." Then follow the affidavits and other evidence and certificate of the judge. The date of final adjournment of the June, 1885, term of the district court of Butler county does not appear in the record. On the 27th of February, 1886, the transcript was filed in this court.

The plaintiff now moves to dismiss the appeal, 1st, Because of the failure of the appellant to file an abstract and brief. 2d, Because the transcript was not filed in this court within six months from the date of the rendition of the decree, and, 3d, Because the order appealed from is not a final order.

This court, while it possesses the power to dismiss an appeal in case of the failure of the appellant to prepare an abstract and brief, will only do so where the appellant has wilfully failed to comply with the law or it is apparent that the appeal was not taken in good faith. When a motion to dismiss is about to be made, of which the appellant has notice, it will in many cases be a sufficient excuse for the failure to prepare an abstract and brief, which, if the motion is sustained, would be superfluous. The first ground of the motion, therefore, is overruled.

2d, That the appeal was not taken within six months

from the rendition of the decree. We find three dates given in the record when orders were made in the case, viz., June 13th, August 13th, and August 27th, 1885. It is evident that there is a mistake as to some of these dates. But even if June 13th is correct, this court will not dismiss a case where relief can be given either at law or in equity. *Stewart v. Carter*, 4 Neb., 564.

The error, if such it was, in overruling the application to open the decree, may be reviewed on error as well as appeal; and where such is the case, the court, upon such terms as may be just, will permit the filing of a petition in error. *Id.*

The 3d ground of objection, that the order appealed from is not final, if applied to that dissolving the temporary order of injunction, would be correct; but the order from which the appeal is taken is for overruling the application to set aside the default and permit the defendant to answer. This, no doubt, is a final order and appealable. *Mulhollan v. Scoggin*, 8 Neb., 202. *Hale v. Bender*, 13 Neb., 66. *Spencer v. Thistle*, *Id.*, 230. *Dorrington v. Meyer*, 8 Neb., 213. The third objection, therefore, is untenable.

The appellant will have leave, within twenty days, upon the payment of all costs in this court since docketing said cause, to file a petition in error and prepare and serve an abstract and briefs, and in case of his failure to comply with this order within the time designated, the appeal will be dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JANSEN & Co., PLAINTIFFS IN ERROR, v. HERMAN
MUNDT, DEFENDANT IN ERROR.

1. **Pleading: PARTNERSHIP: FIRM NAME.** An allegation in a bill of particulars "that they (the plaintiffs) are wholesale dealers in furniture, and that their place of business is Lincoln, Nebraska," is sufficient under the statute to allow them to bring an action in the firm name.
2. **Attachment: AFFIDAVIT BY ATTORNEY.** An affidavit for an attachment made by the attorney for the plaintiff, wherein he "swears that he is the authorized attorney of the plaintiff in the above entitled action; that he has commenced an action," etc., where it appears from the whole affidavit that the action was brought by the plaintiff, is not void.
3. **Practice: ENDORSEMENT OF PAPERS.** The failure to entitle the papers in a case, or to properly entitle them if it is apparent to what case they relate, is not sufficient to justify the court in dismissing the action.

ERROR to the district court for Seward county. Heard below before NORVAL, J.

Hamilton & Trevitt, for plaintiff in error.

No appearance for defendant in error.

MAXWELL, CH. J.

The plaintiffs brought an action against the defendant before a justice of the peace of Seward county, their cause of action being stated as follows: "Plaintiff complains of defendant, and for cause of action states to the court that they are wholesale dealers in furniture, and that their place of business is Lincoln, Nebraska; that defendant is a retail dealer in furniture, residing and doing business in the village of Utica, Nebraska; that plaintiffs, at the request and on the order of the defendant, sold and delivered to him, the said defendant, goods and merchandise to the

Jansen & Co. v. Mundt.

value of \$200, and that the said amount is now due from the defendant to these plaintiffs, and no part of the same has been paid. The plaintiff therefore asks for judgment against the defendant for \$200 and costs of suit. The plaintiffs further state that the defendant is about to and has commenced to dispose of his property with intent to defraud his creditors. The plaintiffs therefore ask that a writ of attachment be issued against the defendant's land and tenements, goods and chattels, rights and credits.

"(Signed) JANSSEN & Co.

"By JOHN DAVIES, their Attorney."

At the same time plaintiffs filed the following affidavit of attachment:

"The State of Nebraska, }
 "Seward County. }

"John Davies, being first duly sworn, deposes and says that he is the authorized attorney of the plaintiff in the above entitled action. That he has commenced an action before H. M. Wright, a justice of the peace in and for E precinct, Seward county, Nebraska, to recover the sum of \$200 now due and payable to the plaintiffs from the defendant, upon an account for goods sold and delivered to the defendant by plaintiffs at defendant's request and upon his order. The affiants say that they believe that the said claim is just, that the plaintiff ought, as he believes, to recover thereon the sum of \$200, and that the defendant is about to dispose of his property with intent to defraud his creditors.

"JOHN DAVIES.

"Subscribed, etc."

Plaintiffs filed bond at the same time, as follows:

"Whereas, Jansen & Co. have commenced an action before H. M. Wright, a justice of the peace in and for E precinct, Seward county, Nebraska, against Herman Mundt, to recover the sum of \$200, and have filed the necessary

affidavit to obtain an order of attachment against him; now, therefore, we, T. E. Stanard and J. J. Brandt, do undertake to the said Herman Mundt, defendant, in the penal sum of \$400, that the plaintiffs shall pay the defendant all damages, not exceeding the above amount, that he may sustain by reason of the attachment in the action, if the order therefor be wrongfully obtained.

“(Signed) T. E. STANARD,
“T. J. BRANDT.”

That the surety of said bond was duly approved, June 15th, 1885, order of attachment and summons issued, and duly served, as evidenced by officer's return.

That on the 17th day of June, 1885, the following motion was filed :

“Jansen & Co.,
vs.
“Herman Mundt. } ”

“Now comes the said defendant, Herman Mundt, by his attorney, for the purpose of this motion only, and moves the court to dismiss the aforesaid action for want of jurisdiction, and states the following reasons therefor :

“1.—For want of proper parties plaintiff.

“2.—Because the facts stated in said affidavit on which said attachment was issued are not true.

“3.—Because the undertaking filed by John Davies does not purport, nor in fact recite any parties plaintiff.

“4.—Because said affidavit filed by said John Davies in said action has no plaintiff recited therein.

“(Signed) HERMAN MUNDT,
“By J. S. Bennett, his Attorney.”

On the 18th day of June, 1885, the foregoing motion was argued and the following judgment entered :

“The court finds, from the evidence in the case, that the title of the cause was not explicit enough in stating the full name of the plaintiff.

"The court further finds that it does not appear that the company is formed to carry on some trade or to hold some species of property in this state, or is not incorporated.

"The motion is therefore sustained, and it is ordered that the attachment in this action be discharged, and the officer ordered to restore to the defendant the property taken under the attachment. To which the plaintiff excepts. It is therefore by me considered this 18th day of June, 1885, that the case be dismissed and the plaintiff pay the costs herein, taxed at \$11.85."

The case was taken on error to the district court, where the judgment of the justice was affirmed.

Sec. 24 of the code provides that "Any company or association of persons formed for the purpose of carrying on any trade or business, or for the purpose of holding any species of property in this state, and not incorporated, may sue and be sued by such usual name as such company, partnership, or association may have assumed to itself or be known by, and it shall not be necessary in such case to set forth in the process or pleading, or to prove at the trial, the names of the persons composing such company."

It will be observed that the plaintiffs in their petition say that "they are wholesale dealers in furniture, and that their place of business is Lincoln, Nebraska." This is sufficient to show that they are carrying on business in this state; and while there is no allegation that the company was formed for the purpose of carrying on business in this state, the formation of the company will be presumed when it is alleged that the company is actually carrying on business in the state. The object of the statute is to enable partnerships doing business in the state to sue or be sued as a distinct entity having some of the characteristics of a *quasi* corporation. The allegation as to the partnership is not as full as could be desired, but there is not an entire failure to allege the existence of such partnership, and the remedy of the defendant was for a more specific statement.

There was not therefore a "want of proper parties plaintiff." The first ground upon which the justice sustained the motion to dismiss is therefore insufficient.

2d. In the affidavit for an attachment the attorney for the plaintiff swears "that he is the authorized attorney for the plaintiff in the above entitled action; that he has commenced an action," etc., when he should have stated that the plaintiffs have commenced an action. This, however, does not render the affidavit void. At the most it is voidable, and therefore subject to amendment. But taking the entire affidavit, it clearly appears that the action was brought by the plaintiffs against the defendant, and the defect forms no sufficient cause for dismissing the action.

3d. That the undertaking does not recite any parties plaintiff. There is a recital in the undertaking that, "Whereas Jansen & Co. have commenced an action before H. M. Wright, a justice of the peace in and for E precinct, Seward county, Nebraska, against Herman Mundt," etc. The objection seems to be the same as that made to the bill of particulars,—that it is not alleged that the partnership was formed for the purpose of doing business in this state. If, however, it was intended to apply to the title of the cause, that is sufficiently set forth. The failure to entitle a proceeding properly may be cause for a motion to amend, but is not cause for dismissing an action. *Livingston v. Coe*, 4 Neb., 379. *McMurtry v. State*, 19 Neb., 147. It is desirable that all pleadings in a case should be entitled in the case; but this, particularly in justice's court, is a matter of convenience, and the failure to entitle papers, or a mistake in that regard, will not be a fatal defect provided that it is apparent in what case they were intended to be filed. Courts are created for the purpose of enforcing and protecting rights, not for the purpose of seizing technical and immaterial defects to defeat them. Under the code, if the court has jurisdiction of the subject matter and the parties; any defect in the pleadings or process is amendable, and when

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necessary the proper amendments should be made at the costs of the party in fault. The rule as to amendments is to be liberally construed in furtherance of justice.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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JAMES BRITTON, PLAINTIFF IN ERROR, V. KATE BERRY,
AS CONSERVATOR OF H. P. BERRY, INSANE, DEFEND-
ANT IN ERROR.

1. **Depositions.** In a notice to take the deposition of witnesses therein named, "at the office of M. C. Little in the town of Tonica, county of LaSalle and State of Illinois, *Held*," To contain a sufficient description of the place of taking such depositions *prima facie*.
2. ———: **SUBSCRIBING WITNESS.** Depositions with the names of the witnesses respectively attached thereto, with a cross between the christian and surname, and the word "his" written above and the word "mark" written below the cross, and followed by the words, "subscribed and sworn to before me and in my presence. M. C. Little, Notary Public," *Held*, To be a sufficient compliance with the statute requiring depositions to be "subscribed by the witness."
3. ———: **CERTIFICATE.** *Held*, Unnecessary that the certificate appended to a deposition should contain a statement that the deposition was read to the witness, even where the witness subscribes the deposition by mark.
4. **Negotiable Instruments: PROMISSORY NOTE: INSANITY OF MAKER.** The action being on a note sued by a transferee thereof, and the defense being that the note came to the hands of the transferee after maturity; that the maker of the note at the time of the alleged making thereof was insane, that the note was without consideration, and setting up two set-offs, either

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of which was sufficient in amount to overbalance the amount of the note, and there being evidence on the part of the defendant tending to prove each of said counter-claims, *Held*, That the verdict for the defendant was sustained by the evidence.

ERROR to the district court for Dixon county. Tried below before CRAWFORD, J.

W. E. Gantt, for plaintiff in error, cited: *Wade*, Notice, Sec. 1,232. *Harris v. Hill*, 7 Ark., 452. *In re Christie*, 5 Paige, 242.

J. J. McAllister, for defendant in error.

COBB, J.

Action on a promissory note executed by A. P. Berry to the order of Jos. P. Berry. The petition sets out the making of the note by the said A. P. Berry. That before the commencement of the action the said note was duly assigned to the plaintiff for value. That no part of it had been paid, etc. That on or about the month of May, 1879, the said A. P. Berry was adjudged by the circuit court of the State of Illinois to be a person of unsound mind, and that on or about the month of September, 1879, the defendant, Kate Berry, was appointed by said court conservator of the person and estate of the said A. P. Berry, and that she accepted such appointment and is now such conservator. A copy of the note is attached to the petition as an exhibit.

The answer consists of a general denial. An allegation of the want of any consideration for making and delivering the said note. That the said note came into the hands of the plaintiff long after the same became due, and that the said A. P. Berry, at the time of making, executing, and delivering said note was of unsound mind, and thereby incapable of making or of understanding the same. The answer also contains an allegation of a conspiracy on

the part of the payee of the note, with other persons, to obtain possession of said note and use it for the purpose of attaching certain lands then lately conveyed by the said A. P. Berry. This allegation it is not deemed necessary to further notice.

The defendant also, in and by the said answer, sets up and pleads two several set-offs existing on the part of the said A. P. Berry against the payee of the said note, one of which counter-claims being for the breach and failure to keep and perform on the part of the said Jos. P. Berry of a certain contract in writing, set out in said answer, whereby the said Jos. P. Berry, in consideration of seven hundred and fifty dollars, agreed and contracted with the said A. P. Berry to give, assign, and set apart to him during the lifetime of said A. P. Berry the one-fifth part of all the crops to be raised on certain lands therein described in Wayne county, in this state. The other of said counter-claims being for horses and buggies by the said A. P. Berry sold and delivered to the said Jos. P. Berry, of the value of six hundred dollars.

There was a trial to a jury, which found for the defendant. There were also special findings: *First*, That A. P. Berry was not sane at the time of making and executing the note; and, *Second*, That James Britton purchased the note in suit before the maturity of the same.

A motion for a new trial having been overruled and judgment rendered for defendant, the cause is brought to this court on error by the plaintiff.

There are seven errors assigned, as follows:

1. The verdict is not sustained by sufficient evidence.
2. The verdict is contrary to law.
3. Errors of law occurring at the trial.
4. The court erred in giving instructions Nos. 2, 3, and 4, on its own motion.
5. The court erred in refusing to give instruction No. 9 asked for by plaintiff, and in giving it as modified by the court.

6. The court erred in refusing to give instruction No. 1 asked by plaintiff.

7. That under the special findings of the jury the judgment should have been for the plaintiff.

Plaintiff in the brief passes over the first and second assignments, and I will follow him to the consideration of the third.

The error here complained of is the overruling by the court of the motion of the plaintiff to suppress depositions taken on the part of the defendant. The points of objection to the depositions are, *First*, That the notice does not set out the street and number in the town in which the depositions were to be taken. *Second*, That the witnesses whose depositions were taken were illiterate persons, and their marks were in no manner witnessed or authenticated, and that the notary's certificate does not cure this defect by showing that they had been read to, or in any manner explained to them.

As to the first point, our statute, § 378 of the code, provides that "Prior to the taking of any deposition, unless taken under special commission, a written notice specifying the action or proceeding, the name of the court or tribunal in which it is to be used, and the time and place of taking the same, shall be served upon the adverse party," etc. The notice in the case at bar is "That on Thursday, the 20th day of March, A. D. 1884, the said defendant will take the depositions of * * * and * * * sundry witnesses, to be used as evidence on the trial of the above entitled cause, at the office of M. C. Little, in the town of Tonica, county of LaSalle, and state of Illinois, between the hours of nine A. M. and four P. M. of said day," etc. *Prima facie* the word town does not mean a city or a place of such numerous inhabitants as to render it necessary to locate the office of a notary public or magistrate therein by street or number. Indeed the houses in the average town are not numbered at all. There is no showing in

the record as to the size or number of inhabitants of the town of Tonica, or whether the houses there are known by number. In the absence of such showing it will be presumed that the office of the notary public named in the notice could be readily found by means of the information afforded by the use of the name of the notary as contained in the notice, and that that was the best description available to the defendant.

As to the other point, the statute, § 280 of the code, provides that "The deposition shall be written in the presence of the officer taking the same, either by the officer, the witness, or some disinterested person, and subscribed by the witness." The notary public before whom the depositions were taken certifies, among other things, that the depositions were respectively subscribed by the witnesses in his presence. It is true that upon an inspection of the paper it appears that they subscribed by mark, indicating that they were unable to write their names. In addition to the above the signatures of the witnesses are witnessed in each case by M. C. Little. That he adds the words notary public after his signature, probably makes it no better, but it certainly makes it no worse. The notary also certifies that the depositions were reduced to writing by himself in the presence of the witnesses. The statute does not require the deposition to be read over to the witness, whether he subscribes by mark or otherwise, and I know of no case, certainly we are cited to none, holding the same to be necessary in the absence of a statute requiring it.

Passing the other errors assigned, and deeming it unnecessary, with my views of the case, to discuss them in detail, I will observe that the petition nowhere alleges that the note sued on was endorsed to the plaintiff, or that he in any manner became the owner or possessed of it before maturity. This being the case, it cannot be deemed material that the jury in the special findings found that the plaintiff purchased the note in suit before the maturity of

the same. It is not the purchase alone of commercial paper before its maturity which cuts off defenses to it on the part of the maker against the payee, but its endorsement. There was no evidence of the endorsement of the note before or after maturity; and in point of fact it appears from the record that the note never was endorsed.

It not appearing, then, that the note was endorsed to the plaintiff before its maturity, any defense to it which could have been made by the defendant, had action thereon been brought by the payee, could be set up and proved as a defense to the action of the plaintiff. Acting, doubtless, upon this theory, the defendant plead, as we have seen, two counter-claims, either of which was of sufficient amount to set off the amount of the note had it been never so well pleaded and proved. And the depositions having been, as we have seen, properly admitted, there was evidence tending to prove them both.

If these views are correct, it becomes unnecessary to examine the evidence upon the question of the insanity of the maker of the note at the time of its execution, for had the jury charged the defendant with the full amount of the note, principal and interest, they might still have found the verdict which they did find, and it would be sustained by the evidence.

Plaintiff in error does not pursue, in his brief, the errors assigned for the giving and refusing instructions. They will therefore be considered as abandoned.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE WESTERN HORSE AND CATTLE INSURANCE CO.,
 PLAINTIFF IN ERROR, v. S. H. PUTNAM, DEFENDANT
 IN ERROR.

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| 90 | 331 |
| 25 | 508 |
| 20 | 331 |
| 40 | 68 |

1. **Trial: VERDICT :- VALUATION OF PROPERTY.** The jury, upon trial of an issue joined, are the judges of the weight of the testimony submitted to them. Where, upon a question of the value of the property, a witness, in answer to an hypothetical question, gives evidence of the value of property of the kind and quality of that in question, a verdict adopting such valuation will not be molested, as not supported by sufficient evidence, if no other testimony of value is given.
2. **Error without prejudice, committed on a trial of a cause** will not require the reversal of a judgment.
3. **Insurance: STOCK: ARBITRATION: WAIVER.** Where an insurance policy provided that, upon notice of loss being given, the insurer would cause the alleged loss to be properly investigated, and if the claims for loss should prove correct it would be paid in a given time; and where in another clause of the policy it was provided that no animal should be insured for more than three-fourths of its actual value, and if in case of loss it should be found upon investigation that the animal was insured for more than that, the insurance company would pay only three-fourths of the actual value, in case the claim was just, such value to be determined by arbitration in case of a failure to agree thereon, it was *Held*, That the two clauses of the policy should be construed together; and that in case of a loss the refusal of the insurer to pay any sum whatever, and a denial of the validity of the policy was a waiver of any right to arbitrate; and a suit for the amount due on the policy might be maintained without such arbitration.
4. **Instructions examined and** *Held* to conform to the pleadings.
5. **Evidence examined and found sufficient to sustain the verdict.**

ERROR to the district court for Dixon county. Tried below before CRAWFORD, J.

Barnes Bros., for plaintiff in error.

W. E. Gantt and *W. F. Norris*, for defendants in error.

REESE, J.

This was an action on a policy of insurance, executed by plaintiff in error to defendant in error, by which the plaintiff in error insured a certain jack, or stallion ass, as it is termed in the policy, for the sum of \$300, the real value of which was stated in the application for insurance at \$400.

The petition is in the usual form. The answer denies all the allegations of the petition except the issuance of the policy and the corporate existence of plaintiff in error—defendant below.

The answer contains the further defense, that in order to induce plaintiff in error to issue the policy of insurance, defendant in error made a written and printed application for said policy, and in said application falsely and fraudulently represented to plaintiff in error that the animal to be insured was in a good state of health, and of the value of four hundred dollars, "which said representations, by the terms of said policy, were made a part thereof, and the basis upon which the same was issued; and it was further provided by the terms of said policy, that should said representations prove false and fraudulent, that said policy should be void." It is alleged that said representations and statements were false and fraudulent. That the animal was not in a good state of health, but was at said time "sick, lame, and diseased, and for more than five months prior to said date had been diseased with a large sore on one of his fore-legs. That it was not of the value of four hundred dollars, or any other sum, because he was unfit by reason of said sickness and disease for the purposes for which he was kept, to wit, as a stallion ass, and could not get colts, all of which said plaintiff knew at the time." It is alleged that defendant falsely and fraudulently represented that this animal insured was only six years old, when in fact it was much older—so old as to be worthless,

which defendant in error well knew. That said false representations were made to procure the issuance of the policy, and were relied on by plaintiff in error. That after procuring the policy defendant in error failed to furnish proper and suitable stabling for the animal insured, but kept it during the storms of winter under an open shed and exposed to the storms and the inclemency of the weather, and by reason of the disease, old age, and exposure, the animal died.

The reply denied all the allegations of the answer.

A jury trial resulted in a verdict and judgment in favor of defendant in error for the full amount of the policy. The insurance company prosecutes error to this court.

It is first insisted that, by the allegations of the answer, the value of the animal was put in issue, and that in order to recover it was necessary for defendant in error to establish such value by competent evidence. Upon the part of defendant in error it is insisted that the value of the property was not in issue, but that if it were, it was sufficiently proven.

Conceding that the value of the insured property was in issue, we must hold that there was some competent evidence as to such value. J. E. Bennett, a witness of seventeen years' residence in Dixon county, was called by defendant in error for the purpose of proving the value of the property. He showed himself competent to testify upon the subject of the value of such animals. He had never seen the one in question. An hypothetical question, fairly reflecting the testimony offered by plaintiff as to the condition of the jack at the time of the insurance, was propounded to him in connection with the inquiry of the value of the animal. His answer was that if he was healthy, a straight, nice jack, otherwise than as stated in the interrogatory, he would be worth eight hundred dollars. He was then asked what would be the effect on the capacity of such an animal for getting foal, by driving him in the

spring of the year three hundred and fifty miles in fourteen days. The answer was, in substance, that he would be worth less, giving as a reason for his answer the "change of climate in the mare season," and that not one out of twenty-five would ever get a colt, but that he would be good after that. Much stress is laid on this testimony by plaintiff in error, which, it is claimed, destroys the effect of the testimony of the witness wherein he fixes the valuation at eight hundred dollars. We do not so consider it. In the former part of his testimony the witness refers to the general valuation of the property. In the latter he refers only to the value for the year in which it was brought to the state. It may be true that the testimony was not of very great weight, but in the absence of any other it was sufficient for the jury to consider, they being the judges of its weight. No testimony upon the question of value was introduced by plaintiff in error, except in a general way, showing his condition, failure to perform service, etc., while the proof of some value introduced on the part of defendant in error was abundant. Some testimony was admitted as to the value of such property in the market in Missouri, and to which objection is made; but if there was error in admitting it, it was clearly without prejudice under the issues. In this connection it must not be forgotten that the only issue of value presented by plaintiff in error was as to the worthlessness of the property at the time of the insurance, as tending to prove fraud on the part of defendant in error in procuring the policy. As fraud is never presumed, but must be proved by the party alleging it, we think there was sufficient proof of value to sustain the verdict.

The policy contains the following condition: "No animal shall be insured for more than three-fourths of its actual value; whenever, in case of loss, it shall be found upon investigation that the animal was insured for more than that, the company will pay the insured only three-fourths of

such actual value, and no more, if such loss be found correct and just; the actual value to be determined by three disinterested persons, unless agreed upon between the insured and the company."

It is insisted that this condition is binding upon the parties to the policy, and the court erred in admitting any evidence as to value until it was shown that the company had refused to permit the value to be fixed and determined by arbitration, or had in some manner waived the condition.

The fifth clause of the policy provides that "when all necessary documents have been received the company will cause losses to be properly investigated, and if the same shall prove correct and just, will settle them within forty-five days after the establishment of such proof."

The "investigation" provided for in this fifth clause is, without doubt, the one referred to in the fourteenth. There is no suggestion anywhere in the pleadings or proof that plaintiff in error ever sought to avail itself of the benefits of the provisions of the policy now invoked, but, upon the contrary, it refused absolutely to pay anything, declaring that as to it the policy was void. Had it been ascertained that the property was insured for more than three-fourths of its actual value, and had plaintiff in error so notified defendant in error, and had it acknowledged its obligation to pay the correct amount, then it might have insisted on an arbitration of that question. Having refused to pay without claiming anything under the article in question, it has waived any right to insist upon it in bar of the action. *May on Insurance*, sec. 492. *Robinson v. Georges Ins. Co.*, 17 Me., 131. *Goldstone v. Osborn*, 2 C. & P., 550. *Kill v. Hollister*, 1 Wilson, 129. *Thompson v. Charnock*, 8 T. R., 139. *Street v. Rigby*, 6 Ves., 815.

Objection is made to the fourth instruction given to the jury. It is as follows: "The defendant in its answer alleges and claims that it is not liable on said policy for the reason, as alleged, that the defendant was induced to assure

said animal by the false and fraudulent representations of plaintiff as to the age, value, soundness, and health of the animal at the time of the issuance of the policy. This is denied by the plaintiff in his reply. Defendant further alleges that said ass died from disease contracted prior to the insurance, from old age and exposure, and that the animal was old and worthless at the time of the taking effect of the policy. These allegations are also denied by the plaintiff in his reply, and these are the issues for you to determine."

It is said that "this instruction is misleading in that it entirely ignores the question of the value of the property insured." From a careful examination of the answer we think the instruction was correct. As we have seen, there are but two lines of affirmative defense presented by the answer. One, the invalidity of the policy by reason of the false representations and fraud practised by defendant in error in procuring the execution of the policy; the other, negligence in caring for the property after insurance. The question presented for trial was the liability of plaintiff in error on the policy for any sum whatever.

The objection to instruction number six is disposed of by the foregoing, and no further notice of it is necessary.

The next and last contention is that "the verdict is not sustained by sufficient evidence, and is contrary to law."

The testimony was mainly confined to the issues made by the pleadings. There was sufficient to warrant the jury in finding that at the time of the insurance the agent of plaintiff in error was at the house of defendant in error; that he examined the animal; that it was a very large one, in good condition, excepting a healing sore on one of its fore legs, which was afterwards cured; and that the animal was about six years old; that it was worth more than the sum named in the application for the policy; that it was reasonably well cared for, and died from disease through no fault or negligence of defendant in error. There being

Grimison v. Russell.

sufficient proof to sustain a finding of these facts it cannot be molested.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

J. A. GRIMISON, PLAINTIFF IN ERROR, v. H. C. RUSSELL, DEFENDANT IN ERROR.

Promissory Note: CONDITIONS: ACTION. Where an instrument in the form of a promissory note is only to be payable upon condition that another certain promissory note therein named is paid by one of the parties named, the person so named, upon payment of such promissory note, may bring an action to recover the sum due against the persons signing such instrument.

ERROR to the district court for Colfax county. Tried below before POST, J.

C. J. Phelps, for plaintiff in error.

M. B. Hoxie, for defendant in error.

MAXWELL, CH. J.

The plaintiff in his amended petition alleges that on the 13th of August, 1876, one W. Wright, desiring to borrow one hundred dollars of Wells & Nieman, said Wright being insolvent, induced one George H. Wells to sign a note as surety for said Wright, payable to said Wells & Nieman, by reason of which the said Wright could and did obtain the said sum of one hundred and three and $\frac{10}{100}$ dollars; that said money was obtained alone by the credit and financial standing of said George

H. Wells. And as an inducement to the said George H. Wells to sign the note with the said Wright, the said defendant and said Wright executed and delivered to said Wells their promissory note or promise in writing in words and figures as follows:

“\$103.10. SCHUYLER, NEB., Aug. 13th, 1877.

“Ninety days after date, we, or either of us, promise to pay to George H. Wells, or order, one hundred three and $\frac{10}{100}$ dollars, for value received, negotiable and payable without defalcation or discount, at the banking house of Sumner & Co., Schuyler, Nebraska, with interest at the rate of 12 per cent per annum from maturity until paid. In case the note is not paid at maturity, and an action is commenced thereon, we agree to pay reasonable attorney's fees, the same to be allowed by the court, and included in the judgment. The conditions of this note are set out in full upon the back of this note.

“Signed, W. WRIGHT,
J. A. GRIMISON.

“This note is to be binding upon the signers only on the following condition: That a certain note for \$103.10, one hundred three $\frac{10}{100}$ dollars, signed by W. Wright and G. H. Wells, and made payable to Wells & Nieman, of Schuyler, be not paid.

“W. WRIGHT,
“G. H. WELLS,
“J. A. GRIMISON.”

Plaintiff further avers that it was solely in consideration of the foregoing promise by the defendant, he and the said Wells being on terms of great friendship, that said Wells was induced to and did sign the said note to Wells & Nieman as security for said Wright.

That the said firm of Wells & Nieman is composed of N. W. Wells and Henry W. Nieman, and that neither of them is related to said George H. Wells.

That the said Wright made default in the payment of said note to Wells & Nieman, and the said George H. Wells was required to and did pay the full amount of said note, principal and interest, whereby the said defendant became indebted to the said George H. Wells upon and according to the terms of the said promissory note or promise in writing set forth above.

That afterwards, to-wit, on or about the.....day of.....187..., for a valuable consideration the said George H. Wells assigned the said promissory note or written promise to this plaintiff, in words as follows:

“Pay H. C. Russell without recourse.

“G. H. WELLS.”

That said note is still the property of this plaintiff. That the defendant has not paid the same nor any part thereof, though often requested to do so. And he still refuses to pay the same.

That there is due the plaintiff thereon, the assignee of George H. Wells as aforesaid, from the defendant, the sum of one hundred three and $\frac{10}{100}$ dollars, and interest thereon from the 14th day of November, 1877, at the rate of 12 per cent per annum, and an attorney's fee of 10 per cent of the amount found due.

Wherefore plaintiff prays judgment against said defendant for the sum of one hundred three and $\frac{10}{100}$ dollars, with interest thereon from November 14, 1877, at the rate of 12 per cent per annum, also an attorney's fee of 10 per cent of the amount found due, together with the costs of this suit.

The defendant below demurred to the petition, and the demurrer being overruled filed an answer wherein he alleges:

First. That he signed the instrument sued on in this action solely and only upon the request and for the accommodation of the said W. Wright, and that he received no

consideration whatever for signing said instrument, which facts were well known to the said George H. Wells at the time of the execution and delivery of the paper writing upon which this action is founded.

Second. That the written agreement described in the plaintiff's petition herein was executed and delivered by the defendant to the said W. Wright at a time subsequent to the time of the execution and delivery by said George H. Wells to said W. Wright of the note described in the condition written on the back of the said instrument described in plaintiff's petition.

Third. That said George H. Wells was never at any time asked or requested by the defendant to sign the said note mentioned in said condition, nor to give to the said W. Wright any credit or accommodation whatever. That the defendant never at any time promised to the said George H. Wells that he would sign said instrument or any other writing whatever for the accommodation or benefit of the said W. Wright, nor that he would indemnify him in any way for any loss which he, said George H. Wells might sustain by reason of a failure on the part of said W. Wright to pay the said note mentioned in said condition to said Wells & Nieman, or any part of it. That neither prior to the time when said George H. Wells, signed said note payable to the order of Wells & Nieman, nor ever at any time since, has the defendant promised to the said George H. Wells that he, the defendant, would in any manner indemnify him, the said George H. Wells, for the payment of any sum of money which he, the said George H. Wells, might be required to pay or did pay on said note described in said condition.

On the trial of the cause the jury returned a verdict in favor of the plaintiff below (defendant in error). The testimony shows that the G. H. Wells mentioned in the proceedings is not a member of the firm of Wells & Nieman. The only question for determination is, did the

Lammers v. Comstock.

execution of the note or instrument sued on create a liability on the part of the plaintiff in error to pay G. H. Wells when he was required to pay the note of Wright to Wells & Neiman? We think it does. The proof clearly shows that G. H. Wells was required to pay such note and thereby became entitled to recover on the obligation in question. It will be conceded that a surety is bound only by the strict terms of his contract, but applying that rule and he is clearly liable in this case. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOHN LAMMERS, PLAINTIFF IN ERROR, V. JOHN COMSTOCK, IMPEADED, ETC., DEFENDANT IN ERROR.

1. **Taxes: SALE: REDEMPTION.** The failure of a tax purchaser to give notice to the owner or occupant of the real estate to redeem, at least three months before the time of redemption expires, although fatal to the obtaining of a tax deed, is not indispensable to enable the holder of the tax certificate to bring an action to foreclose the tax lien.
2. ———: ———: **COSTS.** The failure to serve such notice may require the plaintiff to pay the costs where the owner or occupant comes forward and tenders the amount due at the time suit is brought.

ERROR to the district court for Cedar county. Tried below before CRAWFORD, J.

W. E. Gantt and Gamble Bros., for plaintiff in error.

Barnes Bros., for defendant in error.

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| 21 | 84 |
| 20 | 341 |
| 34 | 198 |
| 85 | 300 |
| 20 | 341 |
| 39 | 772 |
| 20 | 341 |
| 63 | 570 |
| 20 | 341 |
| 57 | 686 |
| 20 | 341 |
| 61 | 648 |

MAXWELL, CH. J.

In September, 1885, the plaintiff filed a petition in the district court of Cedar county wherein he alleges:

1st. That the land described above as defendant was for the year 1871, and for the succeeding years hereinafter mentioned, assessed and taxed as unknown, and that said land is situated in Cedar county, Nebraska.

2d. That on the 13th day of January, 1883, the amount of taxes due on said land was the sum of \$3,417.65 without interest, and that on said date the said plaintiff purchased said lands from the county treasurer of Cedar county, Nebraska, paying therefor the sum of \$683.52, that being twenty per cent of the amount of taxes levied against said lands for the years 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, and 1881, and a further sum of \$34.18, being the fees allowed the said treasurer for making said sale, and the sum of 50 cents paid said treasurer for making the certificate of said tax sale, and making a total of \$718.20 paid by plaintiff at said date and included in said certificate.

3d. Plaintiff states that said purchase of said lands was made from said treasurer at private tax sale, the said lands having been offered at public tax sale for each of said mentioned years by the said county treasurer of Cedar county, Nebraska, at the time and place required by law, and not sold for want of bidders; that said purchase was made by the plaintiff after the county treasurer had made return and filed in the office of the county clerk a return of his public tax sales of lands in and for Cedar county for each of said mentioned years, as the same appeared by his sale book for lands of said years.

4th. Plaintiff states that the said sale of said lands was made by the county treasurer of Cedar county for the 20 per cent of the amount of taxes due on said lands at the time of the sale of the same to this plaintiff by virtue of

an order of the county commissioners of the county of Cedar, which said order was made after said lands had been offered as aforesaid at public sale for each of said years, and by which order the board of county commissioners fixed as a minimum price on said lands the sum of twenty per cent of the amount of taxes due, and which were so fixed by said board, amounted to \$683.52, and said board by said order authorized the treasurer to sell said lands for said twenty per cent of the amount of taxes due, and said treasurer by virtue of said order sold said lands to this plaintiff.

5th. Plaintiff states that as the purchaser of said lands as aforesaid he has paid other taxes thereon as follows: On February 26th, 1883, all of the taxes due for the year 1882, amounting to the sum of \$347.32. On February 26th, 1884, all of the taxes due for 1883, amounting to the sum of \$54.05. On December 31st, 1884, all of the taxes due for 1884, amounting to the sum of \$79.47.

Plaintiff states that the total amount of taxes paid by him on said lands, including treasurer's fees on sale and cost of certificate of tax sale, amounts to the sum of \$1,199.04.

6th. Plaintiff states that his title to said lands, by reason of his purchase and payment of taxes aforesaid, has failed, and the plaintiff waives all claim of title to said land by virtue of said tax certificate except to and for a lien of the taxes paid as aforesaid on said lands, and that no part of the same has been paid except on lots 1 to 10 inclusive, in block 43, redeemed on the 17th day of March, 1883, and amounting to the sum of \$3.30; also lots 45, 46, 47, and 48, in block 138, and lots 17 and 18 in block 142, redeemed June 12th, 1883, amounting to the sum of \$5.45, that there is now due and payable to plaintiff the sum of \$1,190.29, with interest on \$709.45 from the 18th day of January, 1883, at the rate of 20 per cent per annum; on \$347.32 from the 25th day of February, 1883, at the rate of 20 per cent per annum; on \$54.05 from the 26th day

of February, 1884, at the rate of 20 per cent per annum and on \$79.47 from the 31st day of December, 1884, at the rate of 20 per cent per annum.

7th. Plaintiff states that no proceedings have been had or commenced at law for the payment of said sums of money, nor any part thereof been paid except as stated in paragraph 6th of this petition. Wherefore plaintiff prays judgment that said sums of money may be declared a lien on said lands, the defendant above described, and that said lands defendant herein may be decreed to be sold to satisfy the several sums of money paid as taxes thereon, with interest at the rate of twenty per cent per annum, on \$709.45 from the 13th day of January, 1883; on \$347.32 at the rate of 20 per cent per annum from the 25th day of February, 1883; on \$54.05 at the rate of 20 per cent per annum from the 26th day of February, 1884; and on \$79.47 at the rate of 20 per cent per annum from the 31st day of December, 1884; a reasonable attorney's fee and costs of suit; and for such other and further relief as justice and equity may require.

That thereafter, on the 24th day of February, one John Comstock made application to the court to be substituted as defendant in the place of said land in said action, and an order was entered making him a defendant. He thereupon filed a demurrer to the petition upon the ground that the facts stated therein were not sufficient to constitute a cause of action. The demurrer was sustained and the action dismissed.

The principal ground upon which it is claimed that the petition fails to state a cause of action is the want of an allegation that the purchaser served a written or printed "notice of such purchase on every person in actual possession or occupancy of such land or lot, and also the person in whose name the same was taxed or specially assessed, if upon diligent inquiry he can be found in the county, at least three months before the expiration of the time of re-

demption on such sale," etc. Such a notice is required in all cases where it is sought to obtain a tax deed. *Hendrix v. Boggs*, 15 Neb., 469. *Zahradnicek v. Selby*, 15 Neb., 579. *Young v. Brandt*, 15 Neb., 601. *Seaman v. Thompson*, 16 Neb., 546. *Bryant v. Estabrook*, 16 Neb., 217.

In the last case it is said, in the 5th point in the syllabus, that "under the provisions of section 3, article 9, of the constitution, it is not necessary to serve a notice on the defendant before bringing a suit to enforce a tax lien." The object of giving the notice is simply to enable the land-owner or occupant to pay the taxes due upon the land without additional expense. In order to obtain a tax deed, which depends for its validity upon a strict compliance with the requirements of the statute, such notice, given substantially in the manner provided, is essential. When, however, the purchaser does not ask for a tax deed, but comes into a court of equity to enforce his lien upon the land, the court will look at the purpose of the statute and the intention of the legislature in passing it, and so construe the act as to carry such purpose and intent into effect.

This principle is clearly stated in *Otoe County v. Mathews*, 18 Neb., 466, where it was held that in an action in equity to foreclose a tax lien, "the court will look to the statute, and not to the assessment, as the foundation of such lien, and will regard no defense or objection which goes only to the manner of assessing or levying such taxes, or advertising or conducting the sale," etc. That is, that where a tax is a valid charge upon land, the court will carry out the intention of the legislature in declaring taxes upon real estate a perpetual lien, and providing a mode of foreclosing the same, to make the lien available. Thus, in case of a mortgage, the court will look at the real contract, which is a pledge of the estate for a debt, and treats the time mentioned in the mortgage as only a formal part of it, and determines the rights of the parties accordingly.

This is upon the ground that the general intention shall override the words of the particular stipulation. *Hipwell v. Knight*, 1 Younge & Collyer, 415. So in the ordinary purchase of real estate, the fixing of a particular day for payment is merely formal, and as the court considers that the purpose of the parties was a sale of the real estate, the contract may be enforced in a reasonable time after the day fixed. There are cases where time is of the essence of the contract, as where property will damage in value by the effluxion of time. The real proposition which the statute makes to every one desiring to purchase real estate at tax sale is, that in case the title fails, or no title is obtained, then the purchaser shall receive his purchase money back, with interest; and further, that if the lands were not taxable, the county shall refund the purchase money, interest, and costs to him or his assignee. This does not depend on the question of notice. The statute, by fixing five years as a limitation of the time in which an action to foreclose a tax lien could be brought, by implication repeals the condition that notice to redeem shall be given at least three months before the time of redemption expires, in order to bring an action to foreclose the lien. At the most, the want of such notice, where the land-owner offers to pay the amount due, can only affect the question of costs. In our view, the failure to give the notice required by sec. 131 of the revenue law is not fatal to an action to foreclose the lien for taxes. The other questions involved can more properly be raised by answer when the actual facts in the case can be determined. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

GEORGE M. O'BRIEN ET AL., PLAINTIFFS IN ERROR, V.
WILLIAM GASLIN, DEFENDANT IN ERROR.

1. **Jurisdiction: CONFIRMATION OF SALE.** Where a court of general jurisdiction has rendered judgment in a case under which the real estate of one of the defendants has been levied upon and sold, and the sale confirmed and a deed made to the purchaser, the court will not, upon slight evidence, after a great lapse of time, hold that it was without jurisdiction.
2. **Judicial Sale: AMENDMENT OF OFFICER'S RETURN.** The court, in furtherance of justice, may, after a sale of real estate upon execution, and a return of the officer, permit the officer to amend the return to conform to the facts; and when it is clear that the amendment should be made, the lapse of eight or nine years will not bar the right; but in such case care must be exercised by the court to prevent an abuse of power.
3. ———. In this state the confirmation of the sale cures all irregularities in the proceedings.
4. **Trusts.** Lands conveyed by a warranty deed are not subject to a secret trust in favor of the grantor; and particularly is this true where the lands are afterwards sold at judicial sale as the property of the grantee, and conveyed to an innocent purchaser.
5. **Infancy.** A minor who has conveyed his real estate must disaffirm his deed within a reasonable time after he comes of age or be barred of the right.
6. **Limitation of Actions.** The act of 1869, which reduced the period of limitation in which an action to recover real estate could be brought from twenty-one years to ten years, and gave a reasonable time in which to bring actions before it took effect, applies to causes of action existing before the passage of the statute.
7. **Deeds: EVIDENCE.** A deed of real estate, executed in another state before an officer having no seal, to be admissible in evidence must be certified in the manner provided in the statute.

ERROR to the district court for Douglas County. Tried below before NEVILLE, J.

George M. O'Brien, Moses P. O'Brien, and E. M. Bartlett, for plaintiff in error.

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| 20 | 347 |
| 21 | 571 |
| 20 | 347 |
| 27 | 64 |
| 20 | 347 |
| 31 | 343 |
| 20 | 347 |
| 33 | 788 |
| 20 | 347 |
| 35 | 227 |
| 20 | 347 |
| 36 | 750 |
| 20 | 347 |
| 40 | 203 |
| 20 | 347 |
| 50 | 64 |
| 20 | 347 |
| 58 | 19 |

Howard B. Smith, A. C. Wakeley, and George B. Lake
for defendant in error.

MAXWELL, CH. J.

This is an action of ejectment brought by Gaslin against the plaintiffs in error to recover the possession of lots 8, 9, and 12 in Griffin & Smith's Addition to the city of Omaha. The defendants below (plaintiffs in error) in their answer deny that Gaslin has any right or title to said real estate; allege that the land was conveyed by Jane A. North, on the 21st of September, 1857, to August Graeter, in trust for her minor son, James E. North, and plead the statute of limitations. On the trial of the cause a verdict was rendered in favor of Gaslin upon which judgment was rendered. The cause is now brought into this court by petition in error, there being 68 assignments of error. Many of these errors are unimportant, and only such as are deemed material will be noticed.

The testimony shows that the land in controversy was entered in July, 1857, by Jane A. North, and that she received a patent therefore in 1860; that in September, 1857, she conveyed the land in question by warranty deed to Augustus Graeter, jr.; that in October following Augustus Graeter, jr., by warranty deed conveyed an undivided half of said land to James E. North; that on the same day Augustus Graeter, jr., conveyed an undivided half of said land to Augustus Graeter, sr.; that on January 9, 1858, James E. North conveyed by warranty deed an undivided half of said land to Augustus Graeter, jr.

The following is an abstract from the records of the conveyances affecting said real estate :

O'Brien v. Gaslin.

| GRANTOR. | GRANTEE. | INSTR. | DATED. | RECORDED. | BOOK. | PAGE. | PAGE P. A. | PAGE D. A. |
|--|------------------------------|----------|---------------|---------------|-------|-------|---------------|---------------|
| 1. United States | Jane A. North..... | Patent. | July 2, '69 | | | | 9 | 7 |
| 2. Jane A. North..... | Augustus Graeter, Jr..... | W. D. | Sept. 21, '57 | Sept. 21, '57 | G. | 535 | 9 | all. |
| 3. Augustus Graeter, Jr..... | Augustus Graeter, Sr..... | W. D. | Oct. 20, '57 | Oct. 20, '57 | H. | 524 | | all. |
| 4. Augustus Graeter, Jr..... | James E. North..... | W. D. | Oct. 20, '57 | Oct. 22, '57 | H. | 525 | | und. |
| 5. James E. North..... | Augustus Graeter, Jr..... | W. D. | Jan. 9, '58 | Jan. 9, '58 | I. | 472 | | " |
| 6. Augustus Graeter, Sr..... | Augustus Graeter, Jr..... | W. D. | Jan. 12, '58 | Jan. 29, '58 | I. | 594 | | " |
| 7. Suit of James Woods <i>et al</i> , vs. Baugh <i>et al</i> , in which Augustus Graeter, Jr., was a party defendant. Judgment was rendered for plaintiffs, and execution levied upon land in controversy. | | | | | | | | |
| 8. John Hileman, sheriff..... | J. M. Woolworth..... | S. D. | Aug. 14, '61 | Sept. 6, '61 | N. | 545 | 13 | all. |
| 9. J. M. Woolworth & wife..... | Robert K. Woods..... | S. W. D. | Mar. 28, '62 | Apr. 30, '62 | O. | 209 | 15 | all. |
| 10. R. K. Woods and wife..... | J. M. Woolworth..... | P. of A. | Apr. 11, '68 | Sept. 10, '68 | 4 | 377 | 15 | all. |
| 11. Same by J. M. W..... | Griffin, Gaslin & Smith..... | W. D. | June 6, '68 | June 27, '68 | 4 | 59 | 15 | all. |
| 12. Wm. Gaslin and wife..... | W. R. Bartlett..... | W. D. | Sept. 10, '68 | Sept. 11, '68 | 4 | 382 | 16 | und. |
| 13. W. R. Bartlett and wife..... | Rollin C. Smith..... | W. D. | Feb. 9, '69 | Feb. 13, '69 | 5 | 413 | 16 | und. |
| 14. Griffin & Smith's add'n..... | land in controversy..... | Plat. | Feb. 18, '69 | Feb. 20, '69 | 5 | 448 | 16 | und. |
| 15. Identity of add. with..... | J. M. Woolworth..... | S. D. | Jan. 22, '70 | Jan. 22, '70 | 7 | 768 | 17 | 6 |
| 16. Henry Grebe, sheriff..... | Griffin & Smith..... | Q. D. | Jan. 25, '70 | Jan. 25, '70 | 8 | 5 | 19 | all. |
| 17. J. M. Woolworth..... | Caroline P. Gaslin..... | Q. D. | Feb. 10, '70 | Feb. 11, '70 | 8 | 89 | 19 | all. |
| 18. Griffin & Smith & wives..... | Wm. Gaslin, Jr..... | P. of A. | Dec. 21, '70 | Jan. 5, '71 | 10 | 360 | 19 | all. |
| 19. C. P. Gaslin..... | R. C. Smith..... | W. D. | Jan. 5, '71 | Jan. 5, '71 | 10 | 363 | 20 | all. |
| 20. C. P. Gaslin, by W. G. Jr..... | Wm. Gaslin, Jr..... | W. D. | Oct. 31, '71 | Nov. 1, '71 | 11 | 640 | 20 | all. |
| 21. R. C. Smith and wife..... | | | | | | | | |

Abbreviations. — "D. A.," defendant's abstract; "P. A.," plaintiff's abstract; "W. D.," warranty deed; "Q. C.," quit-claim deed; "S. W. D.," special W. D.; "S. D.," sheriff's deed; "P. of A.," power of attorney.

Objections were made to the introduction of a copy of the deed from Augustus Graeter, sr., to Augustus Graeter, jr., which will be noticed hereafter.

In 1859, Woods, Christie & Co. brought an action in the district court of Douglas County against William J. Baugh, A. B. Dawkins, and A. F. Graeter, and afterwards recovered judgment in said action, under which the land in question was sold as the property of A. F. Graeter. This sale was afterwards confirmed and a deed made to the purchaser. It is earnestly urged that the court had no jurisdiction in the premises, and that the entire proceedings are void. Without at this time, more than twenty-five years after the judgment was rendered, reviewing the proceedings step by step as though the case was now before us on error, we will say that the testimony fully establishes the fact that the court had jurisdiction in that case, and that its judgment is final and conclusive. It seems that afterwards, in the year 1869, an application was made to have the sheriff amend his return to conform to the facts, and leave was granted and the return amended. This power to permit amendments to conform to the facts is inherent in courts of record, and while care should be exercised to see that it is not abused, a denial of the right in many cases would work great injustice. The amendment therefore was a proper exercise of the power of the court.

It is claimed, however, that the judgment at this time was dormant. But that question does not enter into the case. The land had been sold to satisfy the judgment, and the amendment sought was to correct the return according to the facts—to make it state exactly what had been done in the case. Whether the judgment was dormant or not could not affect proceedings which had taken place under it while it was in full force, and a confirmation of the sale cures all irregularities in the proceedings.

The question here involved was before this court in *Day v. Thompson*, 11 Neb., 123, and the sale of the real estate under the order of the court sustained.

But it is claimed that even if the sale was valid, still as the land was conveyed to Graeter in trust for North, that no title passed by the sale. It will be observed that the deed from Jane A. North to Augustus Graeter was a warranty deed absolute in its terms; that the deed from August Graeter, jr., to North, and from North to Augustus Graeter, jr., are the same. In such case it is well settled in this court that an express trust to reconvey to the grantor cannot be raised by a parol promise. *Hansen v. Berthelsen*, 19 Neb., 433. *Courvoiser v. Bouvier*, 3 Neb., 55. Secret trusts are not favored, and even if such a trust could be enforced against the alleged trustee, a *bona fide* purchaser of the premises would be entitled to protection. We hold therefore that no trust was created in favor of James E. North by the several deeds to Augustus Graeter, jr.

Mr. North, at the time he executed the deed to Augustus Graeter, jr., was under the age of twenty-one years, he having reached his majority in 1859. He sought to disaffirm said deed in 1872, by the execution of a deed, of which the following is a copy:

"JAMES E. NORTH } Know all men by these presents,
to } That whereas on the ninth day of
JAMES E. NORTH. } January, A.D. 1858, the undersigned,
James E. North, was seized in fee of the undivided one-half of the west half of the north-west quarter of section twenty-eight, town fifteen, range thirteen, east sixth principal meridian, Nebraska, excepting about seventeen acres thereof owned by O. B. Selden; and whereas, on said last-mentioned day, said James E. North made a warranty deed in form of law to, and at the solicitations, of one Augustus Graeter, jr., pretending thereby to convey to said Graeter, jr., the said interest of said North; and whereas, at the date of said pretended sale and conveyance, the said James E. North was a minor, and under the age of twenty-

one years, which said fact was well known to said Graeter; and whereas said pretended sale and conveyance was so made and procured by and from said James E. North while he was a minor, by said Augustus Graeter, jr.; and whereas, said James E. North, when he did arrive at majority and of the age of twenty-one years did, and ever since has disaffirmed his said deed to said Graeter, jr.; and whereas said interest of said James E. North has been and now is held by him undivided with other parties, whose names are unknown to said North, whereby said North has been prevented from taking active possession of said land. Now, therefore, I, the said James E. North, do hereby disaffirm and annul my said deed by this, my deed of disaffirmance, as at all times since my majority have heretofore done, and place this, my deed of disaffirmance, upon record as notice to all. December 1st, 1871.

"In presence of } JAMES E. NORTH.
 "CHAS. BRINDLEY. } (Int. Rev., 50c.)

"THE STATE OF NEBRASKA, } On this 5th day of April,
 PLATTE COUNTY. } A.D. 1872, before me, a Notary Public in and for said county, personally came the above-named James E. North, who is personally known to me to be the identical person whose name is affixed to the above deed of his disaffirmance, and he acknowledged the instrument to be his voluntary act and deed.

"Witness my hand and notarial seal the date aforesaid.

"CHAS. A. SPEICE, Notary Public.

"Recorded April 29th, 1872, at 8½ o'clock A.M.

"WM. H. JAMS, County Clerk."

The question within what time a minor who has conveyed his real estate must disaffirm his deed after coming of age was before this court in *Ward v. Laverty*, 19 Neb., 429, and it was held that such disaffirmance must be within a reasonable time or be barred of the right, and that three years was not a reasonable time. *Goodnow v.*

Empire Lumber Co., 31 Minn., 468. *Green v. Wilding*, 59 Iowa, 679. *Jones v. Jones*, 46 Id., 466. *Wright v. German*, 21 Id., 585. *Jenkins v. Jenkins*, 12 Id., 195. This is a reasonable rule. The minor, on coming of age, can then determine whether the conveyance was for his benefit or not. If, in his opinion, it was not, the law allows him to disaffirm. The grantee, however, has rights in the premises, and justice requires that the grantor should use reasonable diligence in making his election. The disaffirmance, therefore, of North in 1872 was not within a reasonable time, and was unavailing. It was of no avail for another reason. The legislature of 1869 passed an act reducing the time in which an action for the recovery of real property could be brought from twenty-one years to ten years, and fixed a reasonable time in which to bring actions before the act took effect. This act was held to be valid in *Horbach v. Miller*, 4 Neb., 31, and we adhere to that decision.

The plaintiffs in error, however, claim that they have acquired title to the premises by adverse possession. It would subserve no good purpose to review the testimony upon that point; it clearly establishes the fact that they have not acquired title by adverse possession.

Objections were made to the deed from Augustus Graeter, sr., to Augustus Graeter, jr., executed in January, 1858, for an undivided half of the land in question, for the reason that said deed was executed in another state and acknowledged before a purported justice of the peace, and did not have a certificate of the proper certifying officer of the county where the acknowledgment was taken under seal of his office, showing that the person whose name is subscribed to the certificate of acknowledgment was, at the date thereof, such officer as he is therein represented to be; that he is well acquainted with the handwriting of such officer, and believes his signature to be genuine, and that the execution

and acknowledgment are according to the laws of the state wherein the execution took place. The requirement named in the objection is statutory. The legislature has declared the manner in which a deed executed and acknowledged in another state before an officer having no seal shall be authenticated. This is a matter over which the courts seem to have but little discretion. If the provision is too stringent the remedy lies with the legislature; but to entitle a deed to be received in evidence it must be certified in the mode provided in the statute. *Irwin v. Welch*, 10 Neb., 479. *Heelan v. Hoagland*, 10 Neb., 511.

The plaintiff below introduced testimony tending to show that the deed in question was executed according to the laws of the state of Ohio, the state where the deed was acknowledged. But this is only a part of the statutory requirement, and by no means dispenses with the proper certificate. It is argued, however, that the plaintiffs in error claim title through the deed in question, and that therefore they are not in a position to dispute the validity of the deed. This under certain circumstances is true, but we do not understand that they necessarily base their title on such deed. Gaslin introduced it in evidence showing his right to recover in the case. If, as held in *Irwin v. Welch*, the record of a deed so executed without such certificate is a nullity and inadmissible in evidence as against a subsequent purchaser of the land, a question may arise as to what rights, if any, the plaintiff below acquired by such deed. In any event it devolved on him to offer a deed properly certified as a part of his claim of title, and until he did this the adverse party might rely upon his possession alone as a defense. The court therefore erred in admitting the deed in question.

It is unnecessary to trace the various conveyances by which Judge Gaslin acquired title. They will be seen by an examination of the abstract heretofore given. He is shown to have a clear title to an undivided half of the

Wilcox v. Brown.

premises in question, and within twenty days from this date he may elect to have judgment entered in this court for that quantity. In case of his failure to elect within the time named, the judgment of the district court will be reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

THE other judges concur.

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| 30 | 355 |
| 26 | 755 |

MARY E. WILCOX, PLAINTIFF IN ERROR, v. CHARLES H. BROWN ET AL., DEFENDANTS IN ERROR.

Replevin: DISMISSAL OF ACTION. An action of replevin was commenced before a justice of the peace and a return made by the sheriff showing the value of the goods to be \$821.44. The justice then prepared a transcript of the proceedings for the district court, but whether it was filed or not does not appear. Soon afterwards the plaintiff and defendant appeared before the justice and caused the following entry to be made on his docket: "By agreement of both parties this suit is dismissed and the sheriff is ordered to return said goods to the defendant, from whose possession they were taken." *Held*, That independently of the question of the jurisdiction of the justice, it was a valid agreement to dismiss the action, and that if the property was in possession of the sheriff it was his duty to return it to the party from whom he had taken it.

ERROR to the district court for Harlan county. Tried below before GASLIN, J.

C. C. Flansburg and John Dawson, for plaintiff in error.

Case & McNeny, for defendants in error.

MAXWELL, CH. J.

This action was brought by the plaintiff against the defendant Brown, as sheriff of Harlan county, and his

sureties, to recover the value of certain goods which it is claimed he has unlawfully detained from the plaintiff.

The defendants in their answer admit the election of Brown as sheriff, and the execution of his bond with the sureties above named, but deny that on the 20th day of August, or at any other time, the plaintiff became the owner of the stock of millinery goods, furniture, and fixtures in her petition mentioned, and deny that on the date aforesaid, or at any other time, she went into possession of the same.

"3d. But defendants say that on the 20th day of August, 1885, one Canna Willis made, executed, and delivered to the plaintiff herein a certain bill of sale whereby she made a pretended transfer of the said stock of millinery goods, furniture, and fixtures, the pretended consideration whereof was the sum of \$650. But these defendants say, in truth and in fact, there was no consideration for said pretended transfer; that the same was made wholly without consideration, and with intent and purpose, both on the part of said Canna Willis and the plaintiff herein, to cheat, defraud, hinder, and delay the firm of Lockwood, Englehart & Co., then creditors of the said Canna Willis, and to cheat, defraud, hinder, and delay others, the creditors of the said Canna Willis; that the purpose so to cheat and defraud the said creditors was well known to the plaintiff herein at the time of the said pretended transfer, and was done in collusion by the said Canna Willis and the plaintiff herein, whereby, without consideration, and with the sole intent and purpose of cheating and defrauding, hindering and delaying the said creditors of Canna Willis.

"4th. And defendants further say that said defendant Charles H. Brown, under an order of replevin issued out of the justice court of A. A. Brown, a justice of the peace in and for Harlan county, Nebraska, at the suit of Lockwood, Englehart & Co. against Mary E. Wilcox, did levy upon the said stock of millinery goods, furniture, and fix-

tures, on the date in plaintiff's petition alleged. But defendants say that after the seizure by said defendant Brown, under the writ aforesaid, of the said stock of millinery goods, furniture and fixtures, and after his taking possession of the same, he caused the same to be appraised by the oaths of two responsible persons of said county, who appraised the value of the same at \$821.44; that thereafter, and within twenty-four hours after the levy under the said writ, he caused Lockwood, Englehart & Co., the plaintiffs in said replevin suit, to give a good and sufficient undertaking to the plaintiff herein, in the sum of \$1650, signed by Lockwood, Englehart & Co. and Lee Adams, conditioned that the said Lockwood, Englehart & Co. should duly prosecute their action and pay all costs and damages awarded against them, and return the property to the defendant in case judgment for a return of the property should be awarded against them, and conditioned in all respects as by law required; and thereupon defendant Brown approved the said bond, and delivered and turned over to said Lockwood, Englehart & Co. the stock of millinery goods, furniture, and fixtures, as by law required, and did perform all other acts and things, under and by virtue of said writ, in the manner required by law, and made due return thereof, and of all the proceedings thereunder, on the 29th day of August, 1885, to A. A. Brown, justice of the peace as aforesaid, before whom said replevin suit was then pending; that thereafter, upon the return of said writ, bond, and appraisal, and on the 29th day of August, 1885, the said cause by the said A. A. Brown, justice of the peace, before whom the same was then pending, was duly certified to the district court of Harlan county, Nebraska.

"That on the day of, 1885, and after giving bond in replevin aforesaid by the said Lockwood, Englehart & Co. to the said Mary E. Wilcox, the said Lockwood, Englehart & Co., with the knowledge, consent, and

approval of said Mary E. Wilcox, sold and delivered the said stock of millinery goods, furniture, and fixtures to Mrs. Catherine Ver Bryck, who is now the owner and holder thereof; and that upon the giving of said bond in replevin, and after the defendant Brown had turned over the possession and control of the said stock of millinery goods, furniture, and fixtures, to said Lockwood, Englehart & Co., and after defendant Brown had made his return as aforesaid, and after said cause had been certified to the district court of Harlan county, Nebraska, as aforesaid, and after said goods and chattels and fixtures had been sold and delivered to said Ver Bryck by said Lockwood, Englehart & Co., and Canna Willis, with the consent of plaintiff herein, then the said Lockwood, Englehart & Co., and the plaintiff herein, without the knowledge or consent of defendant Brown, caused to be made and entered upon the docket of said justice of the peace the order of dismissal of the said replevin suit, and the order upon the defendant Brown to return said stock of millinery goods, furniture, and fixtures as in plaintiff's petition set out, well knowing that by their own acts and agreements they had made it impossible for him to comply with the same.

"6th. Defendants deny each and every allegation in plaintiff's petition contained not hereinbefore specifically admitted.

"REPLY.

"For reply to defendant's answer, plaintiff admits the bill of sale set forth in said answer; admits the issuance and service of writ of replevin in favor of said Lockwood, Englehart & Co., and against plaintiff; and denies each and every other allegation therein contained."

On the trial of the cause the jury returned a verdict in favor of the defendants, and a motion for a new trial having been overruled, judgment was entered on the verdict.

The testimony tends to show that on the 24th of August, 1885, Lockwood, Englehart & Co. commenced an action

in replevin against the plaintiff, before a justice of the peace, to recover the possession of certain goods; that an order of replevin was thereupon issued by said justice and delivered to the defendant Brown, who, on the 29th of that month, made the following return :

“Received this writ August 24th, 1885. I replevied the within described goods and fixtures, and called James Bradford and P. P. Bentley, two responsible citizens, and administered to them an oath to make an impartial appraisal of said goods and fixtures, which they did, in writing, which I have hereto attached and made a part of this return.”

In his testimony in the case he says: “I boxed goods up under instructions from Lockwood, Englehart & Co., through their attorney, J. A. Cordeal, and put them in a warehouse. I think I then made a return. The matter was laid away then, and I heard no more until in the course of several days I got the verbal report that there had been a compromise made, that the matter had been settled. A dispute then arose as to who was entitled to the goods, and I held them for instructions of the attorney I replevied the goods for. They were several days trying to fix the matter; finally Cordeal came to me and said, ‘These goods belong to Mrs. Ver Bryck, and she is entitled to them, as she had given her notes.’ I went to her (Mrs. Ver Bryck), and she gave me money to pay storage, and I took her receipt for the goods and gave her the goods. I had no control over the goods at the time this suit was commenced. I do not know where the goods are. The only order I ever received was an oral one from Cordeal to turn over the goods to Mrs. Ver Bryck. Cordeal was a partner of Dawson, who was attorney for Englehart & Co.”

CROSS-EXAMINATION.

“My son was acting as my deputy then. I don’t remember asking Dawson what I should do with these goods

after the dispute arose. I remember you (Dawson) telling me to take the goods back where I got them, and let them fight it out themselves. My son, my deputy, looked after my business in my absence. Mrs. Wilcox asked me about turning the goods over to her, and demanded them of me; this was before I had turned them over to Mrs. Ver Bryck. Mr. Wilcox did not demand the goods then; he was not here. I told Mrs. Wilcox at the time she demanded the goods that I would not turn them over to her, as there was a dispute about the matter, and I was instructed by attorney Cordeal not to do it. This was after the settlement of the replevin suit between Lockwood, Englehart & Co. and Mrs. Wilcox. Cordeal was acting for Lockwood, Englehart & Co. Cordeal is the fellow who wrote out the bill of sale for Mrs. Ver Bryck."

RE-DIRECT EXAMINATION.

"At the time Mr. Dawson told me to turn the goods back, I had turned them over to Mrs. Ver Bryck, and did not know where they were."

The appraised value of the goods in question was the sum of \$821.44, which it was agreed was their true value. The testimony tends to show that upon the return being made to the justice he certified the cause to the district court; that on the 4th of September, 1885, Lockwood, Englehart & Co., and the plaintiff, appeared before the justice and caused the following entry to be made on his docket: "By agreement of both parties, this suit is dismissed, and the sheriff is ordered to return said goods to the defendant (plaintiff in error), from whose possession they were taken." Whether or not this agreement was entered into before the transcript was filed in the district court does not appear, nor is it material, as no attempt is made to impeach it, or to show that the action is still pending in the district court. As there is no proof to the contrary, we are justified in assuming that the above agreement

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was entered into between the parties named, and that the sheriff was to return the goods to the defendant in replevin. Such an agreement, as between the parties entering into it, if acted on by them, must, so far as they are concerned, be considered a settlement of the matter in controversy, in accordance with the terms agreed upon. In the case named it appears to have been agreed that the action should be dismissed and the goods be returned to the party from whom they had been taken, the plaintiff. The temporary right of a plaintiff to the possession of property obtained under an order of replevin terminates upon the discontinuance or abatement of the suit instituted by him, or by judgment against him. Wells on Replevin, § 474. *Lovett v. Burkhardt*, 44 Penn. St., 174. *Bonner v. Dyball*, 42 Ill., 84. *Sheer v. Skinner*, 35 Id., 282.

If the defendant Brown, therefore, was in possession of the goods in question when the parties amicably settled the matter in controversy, he should have returned such goods to the party from whom they were taken. The testimony tends to show that he was in possession and refused to return the goods. It is claimed in behalf of defendants that proof exists to disprove such possession. If so, it does not appear in the abstract. A large amount of testimony is found in the record as to whether or not the purchase of the property in question by the plaintiff from one Canna Willis was not fraudulent as to creditors of said Willis. That question does not appear to arise in the case, as the defendants do not claim to be creditors. No doubt this testimony had a tendency to mislead the jury.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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| 24 | 769 |

THOMAS GROHOUSKY, PLAINTIFF IN ERROR, v. DANIEL
LONG, DEFENDANT IN ERROR.

Forcible Entry and Detention. Where the question presented by the pleadings and proof is the particular interests of the parties in the real estate in controversy, and not the mere right of possession, the action of forcible entry and detainer will not lie.

ERROR to the district court for Cuming county. Tried below before CRAWFORD, J.

Uriah Bruner, for plaintiff in error.

M. McLaughlin, for defendant in error.

MAXWELL, CH. J.

In February, 1885, the plaintiff filed his petition in the county court of Cuming county, in which he alleges, "that he is the owner in fee simple of the S.E. $\frac{1}{4}$ Sec. 16, Town. 23, Range 6; that he had the right of possession of said premises ever since October 27, 1884; that said Daniel Long, defendant, about October 27, 1884, unlawfully and forcibly entered into possession of said premises, and has ever since and does still unlawfully and forcibly detain the same from the said plaintiff; that said plaintiff, on January 28, 1885, served upon said defendant, as required by law, a notice in writing requesting said defendant to leave said premises; that said defendant is a settler or occupier as aforesaid on said lands and tenements without any color of title; and said plaintiff demands restitution."

On February 24, 1885, said defendant filed his answer, setting up his defenses as follows:

"1. He denies each and every allegation of the plaintiff's petition.

"2. Alleges that on May —, 1881, said lands were school lands, at which time said defendant leased the same from the state and went into possession and made improvements thereon of the alleged value of \$1,500, and has ever since lived thereon and had exclusive and uninterrupted possession thereof with knowledge of said plaintiff.

"3. That on October —, 1881, said defendant gave his note, signed by one Fred Koch as surety, to one T. M. Franse for \$222, payable in one year with 8 per cent interest; that shortly after the note became due, said defendant not being able to pay same, it was put into judgment against said defendant and said Koch; and said Koch urged said defendant to pay the same or indemnify him against damage or loss, and being advised thereto by said T. M. Franse, his attorney therein, on about May —, 1884, assigned and surrendered said lease to said Koch as security and indemnity against loss and damage on account of said judgment; that said Koch promised to hold said lease and lands in trust for said defendant for two years, and if said defendant should within that time pay said judgment and indemnify said Koch and pay him all losses and damages he might sustain by being compelled to pay said judgment and costs, he would surrender to said defendant said lease and lands; and it was then agreed between said defendant and Koch that said Franse should put said contract into writing, to be signed by Koch and delivered to said defendant on the next day thereafter, but which they failed and refused to do, although frequently requested thereto.

"4. That contrary to the terms of said trust, and in violation thereof, said Koch, on October —, 1884, made a pretended sale and assignment of said lease to said Franse, who had knowledge of said trust in Koch, and said Franse, confederating with said plaintiff to defraud said defendant out of said lands, secretly and hastily sold said lease to said plaintiff for \$2,700, which he paid to said Franse, and was appropriated to his use and benefit, except \$250, the amount

of said judgment, which said Franse paid; that all this was done without the knowledge of said defendant.

"5. That on the same day said Franse and plaintiff went hastily to the treasurer's office and surrendered said lease, and in some way unknown to the defendant, and without his knowledge or assent, and in violation of his rights, procured a deed for said lands.

"6. That said deed is void and conveys no title as against the defendant, because said lands were held in trust for the defendant, and that the defendant claimed to have the equitable title and a legal estate therein; that the lease procured by Koch was void as against the defendant, who was in possession; that no appraisal of said land was made prior to the purchase by the plaintiff; that no appraisal was had of the improvements on the land; that the value of said improvements was not paid nor offered to be paid to the defendant.

"7. That said plaintiff ought not to maintain his said action because: The plaintiff never was in possession; no sufficient notice to quit was given; this action was once tried in this court and was dismissed; the defendant is the owner and entitled to the possession of said premises, and this action involves the trial of title to real estate, and the court has no jurisdiction to try and determine the same; the plaintiff is estopped to maintain that the defendant is an occupying claimant without color of title, as he declared in a former trial of this case, that the defendant was the tenant at sufferance of the plaintiff."

On the trial of the cause there was a verdict for the defendant, and judgment rendered thereon, which was affirmed by the district court. A very large amount of testimony was taken in the case tending to show the nature of the transaction between the parties. It would subserve no good purpose to set out this testimony at length, or to give even a synopsis of it. It is sufficient to say that there is testimony in the record tending to show that both the

Sang v. Beers.

plaintiff and defendant have rights in the premises which can only be adjusted by a court having common law powers. These facts may not have been known to the plaintiff when he brought his action, and probably were not, but where both parties claim the land itself, or an interest in it, under an apparent title and not the mere possession, their rights must be adjusted by a court having full jurisdiction of the subject matter, and the action of forcible entry will not lie. *Streeter v. Rolph*, 13 Neb. 390; *C., B. & Q. R. R. v. Skupa*, 16, Id., 341. *Nightingale v. Barnes*, 47 Wis., 389. *Hays v. Connelly*, 1 A. K. Marsh., 393. *Jack v. Carneal*, 2 Id., 518. *Dawson v. Dawson*, 17 Neb., 671. The action of forcible entry therefore cannot be maintained upon the facts proved.

The judgment of the court is clearly right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

CHARLES SANG, PLAINTIFF IN ERROR, V. RACHEL BEERS, DEFENDANT IN ERROR.

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| 20 | 365 |
| 33 | 306 |
| 20 | 365 |
| 37 | 603 |
| 20 | 365 |
| 59 | 664 |
| 20 | 365 |
| 62 | 371n |
| 62 | 427n |

1. **New Trial: DISCRETION OF COURT.** Motion for a new trial, whether the grounds therefor are that the verdict is against the weight of evidence, or for accident or surprise, newly-discovered evidence, or for a like cause, are addressed to the sound discretion of the court, and in such cases a decision of the district court in granting a new trial will not be reversed unless there has been an abuse of such discretion.
2. —: **DECISION OF TRIAL JUDGE FINAL.** Upon a motion to set aside the verdict of a jury in which questions of fact are involved, the court hearing the motion becomes the judge of such questions of fact and his decision thereon must be final unless clearly and manifestly wrong.

3. **Bastardy: EVIDENCE.** Upon a trial in the district court in a proceeding under the provisions of the statute for the support and maintenance of illegitimate children, evidence that plaintiff has had intercourse with other men before the birth of the child, and clearly outside of the period of gestation, is immaterial to the issue and therefore inadmissible in evidence. Evidence of such intercourse is admissible only for the purpose of showing that another than the person charged is the father of the child.

ERROR to the district court for Dodge county. Tried below before POST, J.

E. F. Gray and *W. H. Munger*, for plaintiff in error.

Frick & Dolezal, for defendant in error.

REESE, J.

This is an action in which plaintiff in error is charged with being the father of an illegitimate child of defendant in error. Two trials were had in the district court. The first resulted in a verdict acquitting plaintiff in error of the charge. On motion of defendant in error the verdict was set aside and a new trial granted. On the second trial plaintiff in error was adjudged guilty and charged with the maintenance of the child. He prosecutes error to this court.

It is claimed that the district court erred in setting aside the first verdict and granting a new trial. The grounds alleged in the motion therefor may be briefly stated as follows:

- 1st. The verdict was contrary to law.
- 2d. It was not sustained by sufficient evidence.
- 3d. It was against the weight of evidence.
- 4th. Misconduct of defendant (plaintiff in error) in treating the jurors to intoxicating liquors during the term of court at which the cause was tried and preceding the trial of the cause, and systematically associating himself with them after they had been drawn as jurors.

5th. Surprise which ordinary prudence could not have guarded against.

6th. Newly-discovered evidence.

7th. Irregularity of the jury, by which defendant in error was deprived of her full quota of peremptory challenges.

Affidavits were filed in support of the fourth, fifth, sixth, and seventh grounds of the motion and to which counter affidavits were presented. Those filed on behalf of defendant in error consisted of her own, her attorney, and five other persons. Those of plaintiff in error consisted of his own and six other persons. Many of these affidavits are quite lengthy, and cannot be given in full without extending this opinion to much greater length than would be profitable. It must suffice to give a very brief epitome of what might seem to be some of the leading facts presented therein.

The affidavit of J. E. Frick, Esq., one of the attorneys for defendant in error on the trial, is to the effect that he was one of the attorneys for defendant in error in the preliminary proceedings before the county judge in the month of March, 1884, ending on the first day of April. That on or about the 31st day of March, 1884, he, as attorney for defendant in error, entered into a written stipulation with the attorneys for plaintiff in error whereby it was agreed that a certain sum of money was to be paid by plaintiff in error to defendant in error upon condition that, upon examination by a physician, it should be found that defendant in error was pregnant, and that her child should be born alive and remain alive for one week ; but in case the child should be born after the 15th day of June, 1884, then nothing should be paid, and plaintiff in error should be discharged. By this stipulation it seems to have been conceded (at least so understood by the attorneys for the defendant in error) that plaintiff in error was the father of the child if it should be born on or before the date

named. This stipulation, however, was rejected by defendant in error as providing for an inadequate sum. That on the trial it was shown that the child was born prior to 15th of June, 1884, yet plaintiff in error testified that the last time he had sexual intercourse with defendant in error was the last of May, 1883. That relying on the partially admitted fact of the sexual intercourse within nine months prior to the date given, he had not introduced any witnesses except defendant in error and her father, and that the testimony of plaintiff in error was a surprise that ordinary prudence would not have guarded against. Also that at the time of the trial he had no knowledge of the existence of certain other witnesses, residents of Howard county, by whom it could be shown that the parties were frequently together after the time stated as the last by plaintiff in error; and that owing to the sickness of himself at the time of the trial, he did not call to mind the stipulation referred to; that some time prior to the trial he had been informed by counsel for plaintiff in error that it had probably been lost or destroyed. He also averred that after the petit jurors had been drawn plaintiff in error had been unduly and unusually intimate with them, drinking intoxicating liquors with and treating them frequently. That on the trial he had exhausted his peremptory challenges and had been compelled to retain some jurors who denied their bias for plaintiff in error, but who were particularly friendly to him.

Defendant in error made an affidavit in which she corroborated that of Mr. Frick; set out in detail the proposed testimony of absent witnesses, and that she had no knowledge or intimation that the paternity of the child would be denied by plaintiff in error. She also denied any knowledge of the alleged improper intimacies between plaintiff in error and the jurors, or of the knowledge of one Hanson of certain facts stated in his affidavit.

The affidavit of O. R. Hanson was to the effect that

during the summer of 1883, he resided near the home of defendant in error, and up to and as late as July 6th saw plaintiff in error and defendant in error together and saw plaintiff in error going into and coming out of the house of defendant in error at late hours of the evening, but that he did not communicate his knowledge to defendant in error or her attorneys until after the trial.

Robert Gregg made an affidavit that he was acquainted with plaintiff in error, and the jurors to whom the case was tried, and that immediately preceding the trial he saw plaintiff in error with two of the jurors in a certain saloon in Fremont sitting at a table and drinking. That prior thereto, and soon after the names were selected from which to draw the jurors for the term of court, he saw plaintiff in error in the office of the county clerk inspecting the list so selected, and that the jurors selected and afterwards drawn from Fremont precinct were all friendly to plaintiff in error. That after the jurors were drawn plaintiff in error was often seen with them in the city of Fremont, and appeared intimate and friendly with them. That these facts were not communicated to defendant in error nor her counsel until after the trial.

The affidavit of Pelig Card states that on the evening last preceding the commencement of the trial of the cause, he saw plaintiff in error with one of the regular panel of jurors for the term, and who sat in the cause on trial, at a saloon in Fremont drinking intoxicating liquors together, and that they finally became intoxicated, and the juror was conducted to his hotel and room by affiant, who put him to bed in an intoxicated condition. That during the week of court—from the 2d to the 7th of February, 1885—the affiant saw a large number of the petit jurors, while acting as such, in the saloon referred to, drinking liquor, plaintiff in error being with, and drinking with, them. That he did not communicate the facts stated to counsel for defendant in error until after the trial.

James Murray, the county judge of Dodge county, made an affidavit in which he corroborated the statements of others as to the association, familiarity, and drinking with jurors immediately preceding the trial. Affiant also makes a detailed statement of a conversation with one Parish, who was not retained on the jury, we believe, but upon a denial of bias, was challenged peremptorily. A part of this conversation was, under a pledge of secrecy, communicated to counsel for defendant in error before the trial, but as he had this knowledge and of the means of showing the facts and declined to use them, he could not complain therefor, and that part of the subject will not be noticed further.

B. F. French also made an affidavit in which he deposed that he was the proprietor of the European Hotel in Fremont, and that upon the occasion testified to by affiant Card, he saw plaintiff in error and the juror referred to in the saloon named, and that they both became intoxicated and drunk; the juror being so helpless as to require care and assistance in getting to his room, which was in the hotel of affiant.

Mr. Dolezal made an affidavit as to his want of knowledge of any of the facts sworn to by the witnesses; the case being under the especial charge of Mr. Frick.

The counter affidavits filed may be briefly summarized as follows:

M. Dudley, the keeper of the saloon referred to denies having heard the conversation referred to by Murray, and says no such language was used at the time and place stated.

Mr. Plambeck, one of the jurors referred to in the affidavit of Gregg, says the statement that he was in the saloon drinking with another juror and plaintiff in error is untrue.

John Ferrell, the juror referred to, who sat in the cause, made an affidavit denying the statements of Gregg that he with Plambeck and plaintiff in error was drinking

Sang v. Beers.

in the saloon referred to on the evening preceding the trial; that he had no conversation with plaintiff in error before the return of the verdict, nor sat at any table drinking with him.

C. B. Veazy, the foreman of the jury to whom the cause was tried, deposed that the decision was made by the jury on the second ballot, which was unanimous for acquittal, and that the verdict was agreed upon within five or ten minutes after the jury retired.

Plaintiff in error made an affidavit in which he negatives in detail all the statements made by affidavit on the part of defendant in error as to consorting and drinking with jurors; that his notice of the selection of names for jurors was casual, and by reason of his attention being called to the matter by the clerk, he being in the office at the time, but without any purpose of pursuing an improper course toward the jury; that he then believed, and still believes, there was nothing wrong or improper in his action; that he had been a resident of the county of Dodge for sixteen years, much of which time he had been in office, as mayor of the city of Fremont, county clerk of the county, and state senator, and that he was acquainted with substantially all the citizens of the county, but that no more intimate relations existed between him and the jurors named than with many others; and that his treatment of the jurors referred to has been in no way different since they were drawn as jurors from what it was before that time.

Alonzo Parish, the challenged juror, by an affidavit denied the conversation testified to by Murray; that he had no acquaintance with Murray; that he did not see him, to recognize or know him, in the saloon, and that he had never been intoxicated in the saloon referred to, or elsewhere.

Upon these affidavits, did the district court abuse its discretion in granting a new trial? We cannot so hold.

"Motions for a new trial are addressed to the sound discretion of the court, and this rule prevails whether the ground of the motion is that the verdict is against the weight of evidence, or for accident or surprise, newly discovered evidence, or a like cause; but this discretion is a legal discretion." *Tingley v. Dolby*, 13 Neb., 371. There is a very large discretion given to trial judges in the matter of granting new trials, which will not be interfered with unless it be clearly shown that some legal right of the party against whom the order for a new trial is made has been disregarded. *M. P. R. R. Co. v. Hays*, 15 Id., 224.

By an inspection of the affidavits presented to the trial court, it will be seen that there was a direct conflict in the evidence. For the purposes of the motion, the trial court becomes the judge of all questions of fact, and his decision thereon will not be disturbed unless clearly and manifestly wrong.

Without stopping to inquire whether the proposed testimony of Mr. and Mrs. Marshall, and Mr. Hanson would be cumulative, or whether sufficient diligence was shown to excuse the failure to produce the testimony on the first trial, it is sufficient to say that if the trial judge believed the testimony of Gregg, Card, French, and Murray, as to the conduct of plaintiff in error toward the jurors, notwithstanding its contradiction and explanation as furnished by the affidavits on his part, that would be sufficient; for, of this testimony he was, and must be, the sole judge.

Again, as bearing upon the question of surprise and want of diligence, it might be well to observe that the question as to whether improper intercourse had been had between the parties to the suit was not one of the facts submitted to the jury. This was conceded by plaintiff in error. The only contention upon that subject by plaintiff in error was that he had ceased indulgence in the unlawful commerce with defendant in error some two months prior to the commencement of the usual period of gestation, pre-

vious to the birth of the child. Now, considering the fact that the intercourse had actually existed, and the further fact that an agreement of settlement had been partially made, although even without authority from plaintiff in error, and without legal force, yet we could not hold that the district court erred and abused its discretion in giving a new trial, if given for that reason alone. *White v. Church*, 5 Conn., 187. *Marsh v. Weber*, 13 Minn., 99. *Hilliard on New Trials*, 6, *et seq.*

It is next contended that the court erred on the second trial in excluding the deposition of one C. S. Curtis, which was offered by plaintiff in error to prove a single act of intercourse with a stranger about the 15th to the 20th of May, 1883.

It is shown by the testimony that the child of defendant in error was born on the 17th day of May, 1884, twelve months after the alleged intercourse with the stranger. We know of no rule of evidence by which this deposition would be admissible.

In *Masters v. Marsh*, 19 Neb., 458, it is said by Judge COBB, in writing the opinion of the court, that the "defendant may show, by the complainant or any other witness, that she had intercourse with any man, other than the defendant, at or about the time when the child must have been begotten according to the usual course of nature. The period of gestation may be safely stated as a general proposition at from 252 to 285 days. Allowing the greatest latitude of inquiry I think it should be confined to a period of time between the lowest period of time above stated and that of 300 days before the birth of the child."

If the fact of such intercourse were proven it could shed no possible light upon the one question to be settled by the trial—the paternity of the child—as it was only the one act, entirely outside of the period of gestation, which was sought to be proven. But it is claimed that the testimony was admissible as tending to impeach the credibility of defendant in error, she having testified on cross-examination that she had

had sexual intercourse with no other man. This could not be, for, as we have seen, the question was an immaterial one, and whether decided in the affirmative or negative could not aid in the solution of the issue on trial. This being true, the well-established rule stated in *Railroad Co. v. Linn*, 15 Neb., 234, that "a party who on cross-examination of a witness asks him an immaterial question is concluded by his answer and cannot call another witness to impeach him," would still exclude the deposition.

It is next contended that the court erred in overruling the motion for a new trial wherein it is alleged that one J. J. Graham, one of the trial jurors, was not an elector of the county at the time of the trial, and was therefore incompetent.

In *Hickey v. The State*, 12 Neb., 492, Judge MAXWELL, in writing the opinion, quoted with approval the following from *Rockwell v. Elderkin*, 19 Wis., 368: "If the objection had been taken before the trial, by way of challenge, it would have prevailed upon strictly technical grounds, but after the trial it was too late. It is an objection that does not affect the impartiality or intelligence of the juror, and furnishes no presumption against the justice of the verdict."

Plaintiff does not furnish an abstract of the testimony of the juror on his *voir dire* examination—whether taken by a reporter we do not know—but affidavits were made and filed in the district court after the verdict by which the substance of the testimony is, perhaps, shown. Why this departure from the usual practice was made necessary does not appear. But passing all other questions, we must hold that the decision of the trial court on the questions of fact presented by the affidavits must be final. The juror showed that he fully believed that he was a qualified elector of the county; that he had voted at the preceding general election, and had been a resident of the county more than forty days. Other witnesses testified to similar facts. There is

State v. Berka.

no question as to the juror being a citizen of the state, and to the mind of the writer there is as little doubt that he was a competent juror.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. D. J. SELDEN,
v. LOUIS BERKA.

1. **Statutes: AMENDMENTS.** In amending an act it may be designated by its title or chapter in the compiled statutes. *Dogge v. The State*, 17 Neb., 140.
2. **Constitutional Law: JUSTICES OF PEACE IN CITIES OF FIRST CLASS.** The provision of section 19, article 6, of the constitution of the state which requires that "all laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction, powers, proceeding and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments, and decrees of such courts severally shall be uniform," is not violated by the enactment of a law limiting the number of justices of the peace in cities of the first class to three, to be elected in districts to be created by the board of county commissioners of the counties in which such cities are situated.
3. **Uniformity of Laws.** A law, which is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, is not objectionable as wanting uniformity of operation.

ORIGINAL information in *quo warranto*.

George W. Doane and John W. Lytle, for relator.

John C. Cowin and A. C. Troup, for respondent.

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| 20 | 375 |
| 32 | 421 |
| 20 | 375 |
| 33 | 124 |
| 20 | 375 |
| 35 | 404 |
| 35 | 679 |
| 20 | 375 |
| 37 | 300 |
| 20 | 375 |
| 46 | 82 |
| 20 | 375 |
| 44 | 565 |
| 20 | 375 |
| 49 | 205 |
| 52 | 223 |
| 52 | 247 |
| 552 | 525 |
| 20 | 375 |
| 59 | 3 |
| 59 | 424 |
| 20 | 375 |
| 61 | 138 |

REESE, J.

This is an information in the nature of a *quo warranto* filed by relator, who alleged that respondent usurps the office of justice of the peace in the city of Omaha.

Prior to the year 1885, under the provisions of section seven of chapter twenty-six of the Compiled Statutes of 1881, each precinct in the state was entitled to two justices of the peace. Relator held this office in precinct No. 2 of the city of Omaha, and he alleges that at the general election in 1885 he was re-elected to said office for that precinct.

In 1885 the legislature passed an act entitled "An act to amend section 7 of chapter 26 of the Compiled Statutes entitled 'Elections,'" and which act so amended the section as to provide that in cities of the first class but three justices should thereafter be elected, and requiring the county board, in counties containing cities of the first class, to divide such cities into three convenient districts, composed of two or more wards or voting districts, for the purpose of electing three justices therein. It is alleged in respondent's answer that the city of Omaha was so divided by the county board in September, 1885, and that he was elected to the office of justice of the peace in one of the districts so formed, and that in January, 1886, he duly qualified and is now legally holding the office.

The question presented for decision is as to the constitutionality of the act of 1885 referred to, and which may be found in the session laws of 1885, at page 249. If the act is unconstitutional, as claimed by relator, then all proceedings under it are void, and respondent must be held as holding the office without authority of law. But if the act is valid, his authority is unquestioned.

There are three reasons assigned by relator why the act referred to should be held to be unconstitutional.

1. That it does not conform to the requirements of sec-

tion 11 of article 3 of the constitution of this state, which requires that "No bill shall contain more than one subject, which shall be clearly expressed in its title." As we have said, the title to the act in question is, "An act to amend section 7 of chapter 26 of the Compiled Statutes, entitled, 'Elections.'" It is claimed that as the original act, passed in 1879—Laws 1879, 240—has a title, which is, "An act to provide a general election law, the procedure relative to contested elections, and the filling of vacancies in office," that said title to the original act is so restrictive as to exclude the idea of a division of cities by the county board as provided in the new act. In other words, that the new act goes outside of the subject matter expressed in the title of the original act, to which it is amendatory, and is therefore unconstitutional and void.

However it might be, were the act strictly an amendment of the former act, or were it designed by the legislature as such, yet we think the objection urged cannot be made to apply to it, for the reason that it did not seek to amend the act of 1879, but rather the section of the chapter of the Compiled Statutes of 1881. This compilation was made by authority of law, under the provisions of the act of February 26th, 1881—See Comp. Stats. 1881, Ch. 95—and when made becomes as much the law of this state as though made directly by the legislature itself. It reduced the laws of the state into one compact body, and became its own evidence of the correctness of its contents without "further proof or authentication." It seems therefore competent for the legislature in amending any of its provisions to refer to them as therein contained, without in any way referring to the original acts of which it was composed. This question was before this court in *Dogge v. The State*, 17 Neb., 140, and it was there held, as stated in the syllabus and opinion written by the present Chief Justice, that "In amending an act it may be designated by its title or chapter in the Compiled Statutes." We adhere to the rule there stated.

2. It is next contended that the act in question is in violation of section nineteen of article six of the constitution. This section is as follows: "All laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments, and decrees of such courts severally shall be uniform." It is said that "if these provisions have any force or signification, it is that all laws providing for the organization of justices and the election of justices thereto shall be of uniform operation throughout the state * * * that justices' courts cannot be organized upon one basis in one part of the state, and upon another and different basis in other parts."

We cannot give to the section referred to the construction contended for.

It is provided in section eighteen of the same article that "justices of the peace and police magistrates shall be elected in and for such districts, and have and exercise such jurisdiction as may be provided by law." Now, referring to section nineteen again, it cannot be contended that any change is made by the new act in the "organization" of justice courts. Those in the city of Omaha are *organized* just as justice courts in other parts of the state. These courts are informal in their organization, but so far as any formality may extend it is the same. There is no change in their "jurisdiction," their "powers," their "proceedings and practice," nor in the force and effect of their "proceedings, judgments, and decrees." The only element in this section which requires our attention is the first clause, which requires that "all laws relating to courts shall be general, and of uniform operation."

We are unable to detect any distinction in principle between a constitutional provision which requires *all* laws to be of uniform operation, and one which is limited to a par-

ticular department of legislation, or a particular character of laws. Upon this point it seems to be settled that if a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, it is not objectionable as wanting uniformity of operation. *McAunick v. R. R. Co.*, 20 Iowa, 388. *Haskell v. City of Burlington*, 30 Id., 232. *R. R. Co. v. Soper*, 39 Id., 112. *State v. Graham*, 16 Neb., 76. *Cooley Const. Lim.*, sec. 390. The same rule being applicable to the clause in question, it must be decisive as to the objection made.

We think, however, that there may be serious doubts as to the applicability of the provision quoted to the case at bar. It would seem that the general scope of the provision refers more directly to courts, their organization, jurisdiction, powers, proceedings, and practice as such, than to the methods of selecting the persons whose duties it shall be to exercise the functions of courts; but as that question does not necessarily arise, it need not be discussed.

3. The contention that the act is special in its applications and results, and that the election of the justices provided for would in effect be a special election, and that therefore the provisions of section fifteen of article three of the constitution is violated, has been sufficiently noticed in the foregoing, and, we think, may be dismissed without further discussion.

We are unable to hold that the act of 1885 is unconstitutional. The information of relator must therefore be dismissed.

JUDGMENT ACCORDINGLY.

The other judges concur.

GEORGE B. KAY, PLAINTIFF IN ERROR, v. GEORGE
NOLL, DEFENDANT IN ERROR.

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| 90 | 380 |
| 97 | 247 |
| 20 | 380 |
| 39 | 250 |
| 20 | 380 |
| 45 | 798 |
| 20 | 380 |
| 49 | 664 |
| 49 | 749 |
| 51 | 314 |
| 20 | 380 |
| 56 | 194 |
| 57 | 453 |

1. **Replevin: CONSPIRACY AND FRAUD: EVIDENCE.** The defense in an action of replevin being founded upon an alleged conspiracy between B., the agent of the plaintiff, and R., the maker of the chattel mortgage under which plaintiff claims, to defraud the creditors of R., by means of the making, delivery, and foreclosing of said mortgage, and said B. having been called as a witness by the plaintiff, and being under cross-examination by defendant's counsel, and having stated, in reply to a question put by counsel, that he went to board with R. shortly after the execution of the mortgage, *Held*, Error on the part of the court to refuse to allow R. to state, in reply to a question put by plaintiff's counsel, how he came to go to the house of R. to board.
2. —: **RIGHT OF POSSESSION: EVIDENCE.** The question being confined to that of the right to the possession of the property at the date of the commencement of the action, evidence offered by the plaintiff to prove that at the sale of the property on foreclosure of the mortgage some time after the replevin of the same, he used diligence to procure bidders from abroad, and to sell the property at the best price, *Held*, Properly refused.
3. —: **FRAUDS: INSTRUCTIONS TO JURY.** There being no evidence of a fraudulent intent on the part of R. in executing the chattel mortgage under which plaintiff claims the goods in question, *Held*, Error on the part of the court to change, alter, and modify the several instructions offered by plaintiff, and set out in full in the opinion, by adding thereto the words, "or unless he (the plaintiff) had notice of such facts as would lead a man of ordinary prudence and diligence to a knowledge of such fraudulent intent on the part of R."
4. **Trial: EVIDENCE.** There being no evidence before the court that any witness had sworn falsely, but the main witness for the plaintiff, before his final dismissal as such witness, having asked leave to make a correction and retraction of a part of his testimony, *Held*, Error on the part of the court to give in charge to the jury the maxim *Falsus in uno, falsus in omnibus*.
5. —: **ISSUES.** Upon the evidence, *Held*, Error on the part of the court to submit to the jury for their special finding the question whether "the mortgage of plaintiff is fraudulent and void as against defendant."

ERROR to the district court for Gage county. Tried below before BROADY, J.

Burke & Prout, for plaintiff in error.

T. D. Cobby, for defendant in error.

COBB, J.

The action was replevin. The defendant defended the taking and detention of the goods, which consisted of manufactured saddles and harness and saddler's and harness maker's findings and furniture, on the ground that he was a constable, and had in his hands, for service, eleven writs of execution against Addison C. Rodocker, issued out of justice court, and by him levied upon the goods replevied in the action. That the judgments upon which said executions were issued aggregated, with costs, the sum of \$1,411.54. That the mortgage from Rodocker to Kay was executed and delivered, but that the said Rodocker and one Spencer G. Bryant, as agent for plaintiff, conspired, combined, and confederated together in the making of the same, to hinder, delay, and defraud the creditors of the said Rodocker. That said mortgage was without consideration, and made for the fraudulent purpose aforesaid, etc.

There was a trial to a jury, with a verdict for the defendant, and a finding of the value of his right of possession at \$1,250.41.

There were also special findings as follows:

"Was it the agreement between Spencer G. Bryant, the agent of the plaintiff, and A. C. Rodocker, the mortgagor, that the mortgagor, A. C. Rodocker, should remain in the possession of said goods, and sell the same in the usual course of trade?

"A. Yes."

Also the following special findings on questions submitted by the court on its own motion:

"1. At the commencement of the action what was the value of the property replevied herein?

"A. \$1,152.90.

"2. At the commencement of this action, had the plaintiff's mortgage been paid according to the sixth instruction given on the court's own motion?

"A. No.

"3. If you answer the last above interrogatory numbered '2' in the negative, how much is now due to plaintiff on the note and mortgage offered in evidence?

"A. \$500, and interest.

"4. Is the mortgage of plaintiff fraudulent and void as against defendant?

"A. Yes."

The plaintiff's motion for a new trial having been overruled and judgment rendered for the defendant, the cause is brought to this court on error by the plaintiff, who assigns the following errors:

1. The court erred in refusing to admit testimony offered on the part of the plaintiff explanatory of the reasons why Spencer G. Bryant, agent of the plaintiff, went to board with A. C. Rodocker, the mortgagor.

2. The court erred in refusing to admit testimony offered on the part of the plaintiff, showing the manner in which the mortgage of the plaintiff was foreclosed, and the efforts made by the agent of the plaintiff in securing the highest possible price for the goods, sold to satisfy the mortgage.

3. The court erred in refusing to admit testimony offered by plaintiff, and in admitting testimony given by defendant over the objections of plaintiff.

4. The court erred in giving instructions four, five, and six, asked for by plaintiff, as modified, changed, altered, and amended by the court on its own motion.

5. The court erred in refusing to give instructions asked for by plaintiff and numbered two, seven, eight, and nine.

6. The court erred in giving instructions asked for by defendant, and numbered eight, thirteen, seventeen, nineteen, and twenty.

7. The court erred in giving the instructions on its own motion numbered one, two, three, four, five, six, and seven.

8. The court erred in giving to the jury upon its own motion special interrogatory numbered four.

9. The court erred in reading or sending out, with the jury instructions upon its own motion numbered one, two, three, four, five, six, and seven, without having endorsed upon the margin of said instructions the word "given."

10. The verdict of the jury is not supported by sufficient evidence.

11. The verdict of the jury is contrary to law and contrary to instruction given by the court and numbered twenty.

12. The verdict is irregular and insufficient upon which to render judgment, in that it finds that no damages were sustained by the defendant.

13. The verdict of the jury appears to have been given under the influence of passion and prejudice.

14. The court erred in overruling a motion for a new trial.

It clearly appears that throughout the transactions out of which this litigation arose, the plaintiff, being a non-resident of the state, was represented by Spencer G. Bryant, his agent and father-in-law, who was engaged in business at the place where these transactions took place. Upon the trial this agent was called as a witness for the plaintiff, and testified as to his agency in making the loan of money to Rodocker, to secure which the chattel mortgage was taken; the taking of the note and mortgage therefor; the taking of possession of the mortgaged chattels for the purpose of foreclosing the mortgage; the taking of said goods from him by the defendant, under and by virtue of

executions in his hands against Rodocker; and other facts.

He was then cross-examined by the counsel for the defendant. In the course of such cross examination he was asked by counsel for defendant as follows:

Q. At the time of the execution of this note and mortgage you were boarding in the family with Rodocker, were you not?

A. I was not, sir.

Q. You were not boarding there?

A. I was not at the time this was taken. I had never been in his house, and never even seen his wife, up to that time.

Q. Where were you residing at that time?

A. At the Potter House.

Q. Where were you residing at the time you took possession of the goods?

A. At Rodocker's.

Q. How soon after the execution of this mortgage did you go to Rodocker's?

A. I cannot tell you.

* * * * *

Q. How long did you board at the house of Rodocker after you took possession of the stock of goods?

A. I cannot tell you; I boarded there all winter.

The witness was recalled by counsel for the plaintiff, who, among other questions, propounded to him the following:

Q. State how you came to board at Rodocker's.

Objected to by counsel for defendant, as immaterial, irrelevant, and incompetent.

The objection was sustained.

As before stated, the defense set up in the answer of defendant consists mainly in the allegation of a fraudulent conspiracy between this witness, as agent of the plaintiff, and Rodocker, the mortgagor, to place this mortgage on

the goods as a lien, and then to fraudulently foreclose it, sell the goods, and divide the proceeds, and so defraud the creditors of Rodocker out of their claims. The fact that the witness, pending these transactions, became an inmate of the mortgagor's house and family, was a coincidence which to some extent tended to give color to the charge of the existence of such conspiracy (and might do so if followed up by and connected with other circumstances), and was a circumstance which the plaintiff ought to have been allowed to explain, if he could. To deny him the opportunity of so doing was certainly not conducive to a fair trial.

In the course of the re-examination of this witness, counsel for plaintiff propounded to him the following question :

Q. State as to what efforts you made to have Beatrice men there, and get the highest price for them, the goods?

Objected to as immaterial, irrelevant, incompetent, and not proper rebuttal.

Objection sustained.

The evidence sought to be elicited by this question could only refer to the manner in which the mortgage was foreclosed; so that when it is borne in mind that the question before the court was as to the right of the possession of the goods at the time of the issuance of the order of replevin, it must be apparent that the evidence was inadmissible.

The third assignment of error is too general, and will not be considered.

Upon the trial, counsel for the plaintiff prayed the court to give in charge to the jury his instruction No. 4, as follows:

"4. The jury are instructed that even should you believe from the evidence that Rodocker made the mortgage under which the plaintiff claims the right of possession to the property in question, for the purpose of defrauding his other creditors, yet you cannot find for the defendant, unless you also believe from the evidence that the plaintiff

had knowledge that such was the purpose of the said Rodocker in giving said mortgage, and that he took said mortgage to aid and abet said Rodocker in such purpose."

Which instruction the court changed and modified by adding thereto the following: "Or that he had notice of such facts as would lead a man of ordinary prudence and diligence to a knowledge of such fraudulent intent on the part of Rodocker," and as so changed and modified, gave the said instruction in charge to the jury; also the following:

"5. The jury are instructed that the mortgage introduced by the plaintiff in evidence is not fraudulent on its face, and in order for you to find for the defendant you must believe that there was a fraudulent purpose in the making and receiving of the same which was shared by both the plaintiff in this action and A. C. Rodocker, who made the same."

Which the court changed and modified by adding thereto the following: "Or that Rodocker had such fraudulent purpose, and plaintiff had notice of such facts as would lead a man of ordinary prudence to a knowledge of such fraudulent purpose on the part of said Rodocker. And you are also instructed that such a belief must be formed from believing that a preponderance of the testimony goes to establish such facts;" and as so changed and modified, gave the same to the jury.

The foregoing instructions, as given, no doubt contain a very fair exposition of the law applicable to a case where there was evidence of a fraudulent intent on the part of the mortgagor, and of the existence of facts at the time of the execution of the mortgage indicating such fraudulent intent, which, if inquired into, would have led to a knowledge thereof. But in the case at bar there is no evidence of a fraudulent intent on the part of the mortgagor at the time of the execution or delivery of the mortgage, nor the slightest evidence of any fact, known or unknown to the

mortgagee, indicating or tending to indicate the existence of a fraudulent intent on the part of Rodocker, the mortgagor. When it is borne in mind that the true office of instructions is to give the jury a knowledge of the law applicable to the evidence before them in the case on trial, it must be seen that the most dangerous departure from the true rule is to give instructions expressing the law correctly as applicable to a somewhat similar case, but which by reason of the presence or absence of evidence upon a vital point in the case then before the court and jury is quite inapplicable to it.

Before leaving the question of instructions I will consider some of those given by the court upon its own motion and excepted to by the plaintiff, to wit, instructions No. 4 and 6, as given by the court upon its own motion, and which are as follows :

"4. If you believe that any witness has wilfully and knowingly sworn falsely in this trial on any material fact involved in the trial, you can reject the testimony of such witness in all matters in favor of the party calling him, if you think him unworthy of belief."

* * * * *

"6. You are further instructed that a chattel mortgage of a stock of goods used in the way of retail trade, where the mortgagor is allowed to continue in the possession of the property and to sell the goods in the usual course of trade, is in law fraudulent and void as against the creditors of the mortgagor, no matter whether the parties intended any actual fraud or not, unless it is shown by the evidence to your satisfaction that the sales so made by mortgagor was as agent of mortgagee, under agreement to apply all proceeds of such sales on the mortgage for the benefit of the mortgagee, and that such application of proceeds of such sales was actually made, and in that event the sales would reduce the amount due on the mortgage to their full amount, and if they amounted as much as the mort-

gage would pay off and entirely satisfy the mortgage; and if you should find from the evidence that the plaintiff's mortgage had in this way been paid off before the commencement of this action, then you should find for the defendant."

Like those which we have already considered, these instructions are objectionable, chiefly because of the want of facts in the evidence to render them applicable to the case under consideration.

As to the above instruction numbered four, it appears from the record that when the witness Bryant was first upon the stand he testified that at no time, either at the time the mortgage was executed or afterwards, did he grant Rodocker the right to sell the mortgaged property in the usual course of trade. Upon being recalled the following morning he testified that after having testified as he had the evening before, Rodocker had informed him that he did grant him such permission, and he so qualified his former testimony by saying, "I think I did tell him he might sell and account to me for the property. He brought it to my mind last night, and I think it was the case."

When a witness, on the stand, makes a mistatement of fact and afterwards, before finally leaving the stand, desires to make a correction of it and state the fact as he then remembers or understands it, he will always be allowed to do so, and in such case I have never known a court to apply the maxim *Falsus in uno, falsus in omnibus*. Indeed I think that maxim only applicable to cases where the facts indicate that the false statement is made deliberately and is adhered to by the witness. It is true that in the case at bar the witnesses Rodocker and Winter state the facts somewhat different from that of the witness Bryant, but this difference I think consists more in the construction which the different witnesses placed upon the words used by the parties to the mortgage and alleged contemporaneous agreement than in the words themselves.

But I do not think the facts testified to by the witness which we are now considering at all material in the case. While it has been often held by this court, and is doubtless the law, that in case of a mortgage of merchandise with a stipulation contained in the mortgage (and perhaps equally so where the stipulation is contained in a contemporaneous or subsequent agreement) to the effect that the mortgagor may continue to sell the goods on his own account, or in the usual course of business, such mortgage will be held fraudulent and void as between the mortgagee and such creditors as may seize such goods by virtue of attachment or execution while they remain in the possession of the mortgagor, or before the mortgagee has reduced them to possession under his mortgage; yet I think it about equally clear, if not so well settled by authority, that after the mortgagee has reduced the goods to possession for the purpose of foreclosing the mortgage in conformity to its stipulations his lien will take precedence of those of creditors whose attachments or executions are thereafter levied, notwithstanding the existence of a stipulation such as above referred to or the fact that it has been acted upon by the mortgagor. See *Fitzgerald v. Andrews*, 15 Neb., 52.

What I have said above will apply equally to the first part of the remaining instruction, No. 6. As to the latter part of said instruction, as the jury by a special finding found that the mortgage had not been paid off, in whole or in part, by the means indicated in said instruction, it is not deemed necessary to examine it further.

By the eighth assignment the plaintiff in error complains of the submitting by the court, upon its own motion, to the jury, for its special finding, of interrogatory number four. By this submission the court told the jury to answer by a special finding the following question: "Is the mortgage of plaintiff fraudulent and void as against defendant?"

The submission of this question was entirely unnecessary, and its answer, in addition to the general verdict, could

Kuder v. Twidale.

subserve no useful purpose; but its submission, taken in connection with the giving of the several instructions hereinbefore considered, was erroneous chiefly in that it tended to press upon the mind of the jury the idea of fraud, when, as hereinbefore intimated, there was a total absence of evidence before the jury upon which to predicate a charge of fraud against either of the parties to the mortgage.

Having already extended this opinion to an unusual length, and reached the conclusion that there must be a new trial, the remaining assignments will not be considered.

The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

The other judges concur.

AMELIA KUDER, APPELLANT, v. WILLIAM TWIDALE,
APPELLEE.

Practice in Supreme Court. Where the testimony on behalf of the plaintiff and defendant is nearly equally balanced, and is conflicting, the finding and judgment will not be set aside.

APPEAL from Adams county. Heard below before MORRIS, J.

W. G. Beall and Batty & Casto, for appellant.

Capps & McCreary, for appellee.

MAXWELL, CH. J.

This action was brought in the district court of Adams county to foreclose a mortgage upon certain lots in the

town of Juniata. The defendant, in his answer to the petition, alleges that the mortgage was paid in full by certain meat sold and delivered to plaintiff by the defendant. On the trial of the cause the court found the issues in favor of the defendant, and rendered judgment accordingly. The plaintiff appeals.

The principal ground of complaint is that the judgment is against the weight of evidence. The defendant testifies that he was a butcher; that Dr. Kuder (husband of the plaintiff) kept a hotel until February, 1877; that afterwards the plaintiff kept a private boarding house; that he furnished meat to the plaintiff; that an endorsement on the note of fifty dollars was for meat furnished at the hotel; that the endorsement was made March 15th, 1877, and that he sold to the plaintiff sufficient meat to satisfy the note. In this he is corroborated by his wife. On behalf of the plaintiff, one W. G. Beall testifies that he presented the note for payment to the defendant, and that he said it had been paid by a meat bill; that he called a second time, when the defendant showed him the account book containing the charges, from which it appeared that the meat in question was charged to the husband of the plaintiff.

George Kuder, the husband of the plaintiff, testifies that the plaintiff's name was never on the books of the defendant; "that she never bought a cent's worth of meat of him;" that Twidale presented this account to him three years ago, and "I told him that I did not owe him—that the account was false." The plaintiff also testifies that she never had any dealings with the defendant, and did not owe him a cent.

It will be seen that there is a direct conflict in the testimony. The meat seems to have been charged to Dr. Kuder, but if the testimony of the defendant and his wife is to be believed, it was in fact furnished to the plaintiff. We are led to infer from the testimony that the defendant did furnish meat to the plaintiff and her husband. The testi-

mony upon that point is neither very clear nor satisfactory, but sufficient, perhaps, to justify the court in finding for the defendant. In any event, it is impossible for this court to say, upon the evidence before us, that the finding is erroneous. This being so, the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

The other judges concur.

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EDWARD WHITEHORN ET AL., APPELLEES, v. T. C. CRANZ ET AL., APPELLEES, AND CHRISTIAN SPECHT, APPELLANT.

1. **Vendor and Vendee.** On the facts stated in the opinion, *Held*, That the appellant had no contract for the purchase of the real estate in controversy.
2. ———: **NOTICE OF PRIOR SALE: ESTOPPEL.** At the time of the attempted purchase the appellant had notice of the prior sale of the premises to a third party, and could acquire no title as against such party where the sale was *bona fide*.
3. ———: **PRINCIPAL AND AGENT.** A purchaser with notice is liable to the same equity and is bound to do that which the person he represents would have been required to do but for the conveyance.

APPEAL from the district court for Douglas county.
Heard below before WAKELEY, J.

O'Brien & O'Brien and *Simeon Bloom*, for appellant Specht.

George B. Lake and *Edmund M. Bartlett*, for appellees.

MAXWELL, CH. J.

This is an action for specific performance originally brought by the plaintiffs against Harry C. Cranz, John S.

Wood, and C. E. Perkins to compel the specific execution of a contract for the sale to said plaintiffs of lots 6 and 7 in block 3 in that part of lot 5 in Capitol addition to Omaha known as Perkins' subdivision. The petition was filed June 18th, 1883. In August following Specht, the appellant, obtained leave of court to intervene, and filed an answer in the nature of a cross-petition, in which he claimed to have purchased said lots from Cranz on the 28th of February, 1882. The issues were made up, when on the 8th day of November, 1884, a stipulation was filed in said cause as follows:

"It is stipulated that the above cause be and the same is hereby dismissed, each party to pay one-half of the costs."

This was signed by the attorneys for the respective parties, and on the 8th of November, following in pursuance of said stipulation the action was dismissed. On the 11th of the same month Specht filed a motion to reinstate the case on his own cross-petition, and the motion was sustained. In May, 1885, the cause came on for hearing on said cross-petition, and the evidence and the court found against the appellant and dismissed the cross-petition.

The appellant bases his right to recover upon the following communications:

"Exhibit one."

"OMAHA, NEB., Jan. 11, 1882.

"H. C. Cranz, 314 N. 2d St., St. Louis:

DEAR SIR—Do you want to sell your lots in Perkins' sub-division of lot five in Capitol addition to the city of Omaha? I think I can get you a fair price, say \$1,500.00. My commission in case of sale would be the usual rate, five per cent on first thousand and two and one-half on balance. An early answer will oblige.

"Yours truly,

"JOHN L. MCCAGUE.

"I sold E. P. Peck's lot some weeks ago."

He received in answer thereto the following:

"Exhibit two."

"ST. LOUIS, Jan. 16, 1882. •

"*J. L. McCague, Omaha, Neb.:*

DEAR SIR—Yours of the 11th instant at hand. If you have an offer on my lot and can sell it so as to net me \$1,500 you may do so, but I don't want a sign stuck up on the lot. If I can't get the amount I will hold it. The sale must be also a cash one.

"Yours truly.

"H. B. CRANZ."

The testimony shows that John S. Wood, on the 30th of January, 1882, wrote to Cranz in relation to selling the lots in question, and received the following answer:

"Exhibit A."

"Office of the Diamond Match Co.,
314 N. 2d St., St. Louis, Feb. 6, 1882. }

"*Capt. Jno. S. Wood, Omaha, Neb.:*

"DEAR SIR—Yours of the 30th of Jan. at hand. You may sell for \$1,500 on one year's time, note bearing 10 per cent int., provided you will stand as security, otherwise, I shall want at least \$500 in cash, a mortgage on lot for balance, and note bearing 10 per cent int. In either case, purchaser to pay all expenses of recording deed and mortgage as well as taxes for 1882.

"Mr. McCague says he can get \$1,500, so please advise me, as soon as possible, so I will know what to do.

"Yours respectfully,

"H. C. CRANZ.

"Do not offer for sale after March 1st. If not sold then, I will hold it myself."

To this letter Wood replied as follows:

"OMAHA, Feb. 13th, 1882.

"*H. C. Cranz, Esq., St. Louis, Mo.:*

"DEAR SIR—My friend has concluded to take the lots, so you can deed the lots to me, as I will then be safe. You

Whitehorn v. Cranz.

can send the deed to Captain Broach or to J. H. Millard, Omaha National Bank, with instructions, and I will send you a draft for \$1,500. The purchaser is a Mr. Whitehorn, who belongs to the Glee Club. If you should require the amount in one or more drafts, or payable to different orders, please advise me.

“Respectfully, your ob’t servant,

“JOHN WOOD.”

In answer to the above letter Cranz sent the following:

“SAINT LOUIS, Feb’y 16th, 1882.

“*Captain John S. Wood, Omaha, Neb.:*

“DEAR SIR—Yours at hand. I think the best way to close the sale of the property will be as follows: Give me Mr. Whitehorn’s initials, and I will then transfer or assign my contract over to him, and he can then retain enough to pay the balance due on same, and remit me the balance, or if he prefers, he can avail himself of the unexpired term it yet has to run. I will send the contract, properly assigned, to Capt. Broach, and Mr. Whitehorn can then settle with him.

“I hope you have realized something on the sale for yourself.

“Yours respectfully,

“H. C. CRANZ.”

The record also contains the following receipt:

“Exhibit B.”

“OMAHA, Neb., Feb. 9th, 1882.

“Received of E. Whitehorn and Fannie Whitehorn his wife, the sum of (\$1,500) fifteen hundred dollars, for the payment of lots (6) six and seven (7) in block (3) three Perkins’ sub-division of lot 5 in Capitol Addition to the city of Omaha. H. C. Cranz, by Jno. S. Wood.”

The testimony shows that Cranz held the lots in question under a contract of purchase from C. E. Perkins and that a considerable amount was still due on the purchase

price of said lots, that W. J. Broatch was his agent at Omaha, and that Broatch in 1883 paid \$450, the balance due on said lots. On the 20th of February, 1882, Cranz assigned his contract as follows:

"I, H. C. Cranz, the within named purchaser, for and in consideration of — dollars, do hereby assign and transfer all my right, title, interest, and claim in and to the real estate within described unto John S. Wood, his heirs and assigns forever. And I do hereby authorize W. J. Broatch to receive from him the said — all unpaid balances due to said — in part consideration for said land, and upon the final payment of all the purchase money, and a full compliance with all the requirements contained in the within agreement, to execute, or cause to be executed to him the said — his heirs and assigns, a deed for said lands, instead of to me. Given under my hand and seal, this 20th day of February, A.D. 1882.

"H. C. CRANZ. [SEAL.]

"State of Missouri, }
 "City of St. Louis. } ss.

"Before me, a notary public in and for said city, this day personally came H. C. Cranz, who is known to me to be the identical person who is described in the within agreement, and who executed the foregoing assignment, and acknowledged that he signed, sealed, and delivered the same as his free and voluntary act and deed, for the use and purposes set forth. Given under my hand, this 20th day of February, A.D. 1882.

[NOTARIAL SEAL.]

"C. D. GREENE,
 "Notary Public."

Of this sale Specht was advised at least as early as the 20th of February, 1882. On the 28th of that month McCague gave Specht the following receipt:

"\$100.00. Omaha, February 28th, 1882. Received of Christian Specht, one hundred (\$100.00) dollars as earn-

est of sale of lots 6 and 7, in block 3, in Perkins sub-division, the purchase price being fifteen hundred and fifty (\$1550.00) dollars, upon the perfection of title to Christian Specht.

“H. C. CRANZ,

“By J. L. McCAGUE.”

On the same day McCague sent a telegram to Cranz informing him of the sale to Specht, and on the following day (March 1) received the following telegraphic dispatch:

“To John L. McCague:

“Sold lot several days ago if parties comply with contract.

“H. C. CRANZ.”

The consideration for the above purchase of Whitehorn and wife not being paid, Cranz, on March 2, 1882, attempted to rescind the contract, and notified his agents, Wood & Broatch, to that effect. On the 4th of that month Specht commenced an action in the district court of Douglas county against Cranz, to restrain him from making a conveyance of said lots to the Whitehorns, and obtained a temporary order of injunction. Thereupon Cranz answered the petition and alleged that he never sold said real estate to Specht, and praying that said injunction be dissolved. In support of the motion to dissolve he filed affidavits of Edward Whitehorn, Fanny Whitehorn, J. S. Wood, and W. J. Broatch, tending to show that the sale of the lots in question was made in good faith. The injunction was thereupon dissolved. The appellant Specht thereafter filed his motion to intervene in this cause as heretofore stated. Afterwards, in November, 1884, a settlement was effected between the Whitehorns and Cranz whereby, upon payment by Broatch to Perkins of the unpaid purchase money, a conveyance was made to Broatch, who conveyed to the Whitehorns.

It will thus be seen that Specht had made no offer to purchase the property in question at the time the White-

horns purchased the same, and that he had notice of the sale to them before the 28th of February, 1882, when he made his proposition to McCague and paid him one hundred dollars. The terms upon which Cranz sold the lots in question to the Whitehorns is not a matter of which the appellant can complain provided the transfer was *bona fide* and not a device to defraud the appellant, of which there is no proof. It is unnecessary to discuss the question of the authority of McCague to enter into the contract in question, as the proof clearly shows that Whitehorn's contract is prior in point of time to that of the appellant, and that he had notice of the same. He is not, therefore, a *bona fide* purchaser.

A purchaser of real estate with notice of a prior contract to convey the same to a third party takes the estate incumbered with the equitable right of the original contractor to a completion of his bargain. *Champion v. Brown*, 6 John. Ch., 402, 403. *Boyd v. Vanderkemp*, 1 Barb., Ch. 273. *Atcherly v. Vernon*, 10 Mod., 518. *Winged v. Lofebury*, 2 Eq. Cas. Ab., 32. *Taylor v. Stibbert*, 2 Ves. Jun., 437. *Daniels v. Davidson*, 16 Id., 249.

A purchaser with notice is liable to the same equity, and is bound to do that which the person he represents would have been required to do but for the conveyance. In any view of the case, therefore, the appellant, having purchased with notice of the Whitehorn's right in the premises, is not entitled to specific performance, and the decree of the court below is affirmed.

DECREE AFFIRMED.

The other judges concur.

**S. H. SORNBERGER, PLAINTIFF IN ERROR, v. MARTIN B.
BERGGREN ET AL., DEFENDANTS IN ERROR.**

Landlord and Tenant : CONTRACT OF PURCHASE : FORFEITURE :

EMBLEMENTS. One S. took an assignment of a contract of purchase of certain railroad lands and rented said lands to a tenant for a share of the crops. The contract of purchase contained a provision that in case of the failure of the purchaser or his assignees to make payments thereon, "and each of them punctually and upon the strict terms and times above limited, and likewise perform and complete all and each of his agreements and stipulations aforesaid, strictly and literally without any failure or default so far as it may bind said first party, shall become utterly null and void," etc. *Held*, 1st, that the rights of the vendor did not terminate until there was an actual forfeiture; 2d, that where the vendor had been in default for a number of years, and had by his tenant sowed a crop before a forfeiture of his estate in the land, such forfeiture before the crops were ripe did not deprive him of his interest in said crops.

ERROR to the district court for Saunders county. Tried below before POST, J.

S. H. Sornberger, pro se.

N. H. Bell, for defendant in error.

MAXWELL, CH. J.

This is an action of replevin to recover a quantity of wheat, the answer being a general denial. A jury was waived by the parties, and the cause submitted to the court, which found in favor of the defendants. The principal objection is that the finding and judgment are not supported by the evidence.

S. H. Sornberger, for the plaintiff, testified that in the fall of 1875, he owned certain lands in Saunders county, among which was the southeast quarter and the south half of the northeast quarter of section 29, town 15, range 8—

the latter described land being 240 acres, bought from Emma C. Kelley by the plaintiff, by the assignment to plaintiff of contracts of sale of the same land to the said Emma C. Kelley from the Union Pacific Railroad Company. The contracts were admitted in evidence, together with the assignments, and were in substance as follows:

"On the 25th day of July, 1873, the Union Pacific Railroad Company, in consideration of the payment of ten per centum of the purchase price, and ten subsequent annual payments, thereafter stipulated to be made, agree to sell to the said Emma C. Kelley the lands aforesaid, and on final payment of the full purchase price, in strict accordance with the terms of the contract, to execute and deliver to her or her assigns a warranty deed to said premises."

Embraced in said contract of sale was the following covenant: "And in case the second party shall fail to make the payments aforesaid and each of them punctually and upon the strict terms of times above limited, and likewise perform and complete all and each of her agreements and stipulations aforesaid, strictly and literally without any failure or default, then this contract, so far as it may bind said first party, shall become strictly null and void, and all rights and interests hereby created or then existing in favor of or derived from the second party shall utterly cease and determine, and the right of possession and all equitable and legal interests in the premises hereby contracted, with all the improvements and appurtenances, shall revert to and revest in said first party, without any declaration of forfeiture or act of re-entry, or any other act by said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid or services performed, as absolutely, fully, and perfectly as if this contract had never been made. And said party of the first part shall have the right immediately, upon the failure on the part of the second party to comply with the stipulation of this contract, or any part thereof, to enter upon the

land aforesaid, and take immediate possession thereof without process of law, together with the improvements and appurtenances thereunto belonging.

"And the said party of the second part covenants and agrees that she will surrender unto the said party of the first part the said land and appurtenances, without delay and hindrance, and no court shall relieve the party of the second part from a failure to comply strictly and literally with this contract."

The assignment from Emma C. Kelley to the plaintiff was in writing, and approved by the Union Pacific Railroad Company's land commissioner.

S. H. Sornberger further testified that in the fall of 1875 he leased all his lands, including this, to one William Cameron, who thereupon went into the possession of the same, and continued in the possession of the same until in the fall or winter of 1880, as the tenant of the plaintiff, working the above land, and accounting to the plaintiff for the rents.

That in the fall of 1880 the Union Pacific Railroad Company attempted to sell this land to the defendant, and that the plaintiff was informed by Cameron that Berggren was claiming the rent of the place for that year, 1880. That the plaintiff went promptly to the premises, while Cameron was threshing the grain which was grown on the premises, and claimed, and Cameron delivered, the wheat in controversy to the plaintiff, by putting the same in a bin in a granary belonging to the plaintiff, on an adjoining piece of land of the plaintiff; the same being one-fourth of the grain so grown on said premises, and being the rent for said premises for 1880. That a few days afterwards Berggren and Graham, the defendants, went to this granary and took this identical wheat, and carried it away and sold it. That there were 88 bushels of it, and it was then worth the sum of 65 to 70 cents per bushel. Plaintiff never got the wheat.

On cross-examination Mr. Sornberger testified that he had no recollection of any notice of the cancellation of the contracts for the sale of the land by the company.

The defendant offered M. B. Berggren, one of the defendants, as a witness, who testified that on the 26th day of June, 1880, he purchased the land described by Mr. Sornberger in his testimony from the Union Pacific Railroad Company, upon a contract similar in terms to the terms of one from the said company to Emma C. Kelley, which contracts were admitted in evidence by the court, over the objection of the plaintiff, on the ground that the same were immaterial and irrelevant, and for the reason that no proper foundation had been laid for their introduction, to which the plaintiff excepted. Over the same objection by plaintiff, he was permitted to testify that he did not dispose of the same during the year 1880. That at the time of the purchase of the same from the company the agent of the company agreed to give him the right to the rent for 1880. That he notified Cameron that he looked to him for the rent. That when Cameron threshed the grain in the fall of 1880 he went there and demanded the same, but that Mr. Sornberger, the plaintiff, was there and got the grain, and he did not then get it. That a few days thereafter the defendants went to the premises of the plaintiff, and took the wheat in controversy from the granary of the plaintiff, where it had been stored by the man Cameron, it having been divided out as the one-fourth part of the grain grown on the premises aforesaid; that they took it under a "writ" issued by some justice of the peace, but which writ was neither offered or received in evidence, and its nature is unknown.

On cross-examination he testified that he knew that Cameron had been for years leasing this land, and had been paying rent therefor to the plaintiff; that at the time he purchased, in June, the wheat in controversy was almost ready to harvest; that all that Cameron did by way of de-

Sornberger v. Berggren.

livering it to Berggren as rent was that on demand of defendant Graham he told in what bin the wheat was, and the defendants took it and carried it away, and sold it.

J. B. Davis testified, over the objection above stated, that he was, in 1879 and 1880, the local land agent of the Union Pacific Railroad Company for Saunders county, for the sale of the company's lands; that it was his recollection that Mr. Sornberger was informed that the contract for the land on which the grain was grown was cancelled; that it was his recollection that he was the person who informed him, and that it was either late in 1879 or early in 1880; also that Mr. Cameron knew of a cancellation some time in March, 1880. That at that time he, Cameron, agreed to deliver to the company, or to whomsoever it should direct, one-fourth of the crop. That after Berggren bought the land, at a conversation between Cameron, witness, and Berggren, it was witness' recollection that Mr. Cameron agreed to deliver to Berggren the share which he had previously agreed to deliver to the company.

On cross-examination he stated that the notice which he gave of the cancellation of the contracts was neither in writing or printed, nor was he able to state time or place where notice was given, further than that it was a verbal notice, which he had given plaintiff some time during the winter. And the cross-examination elicited the fact that the contract which Cameron had made with him, as agent of the company, was simply that he had notified him that the company had cancelled the contracts, that they would look to him for the rent, and that Cameron had said that he had as soon pay the rent to them as to Sornberger.

N. B. Berggren, brother of one of the defendants, also testifies that he heard the contract between his brother and Cameron, and that it was agreed that the grain in question was to go to M. B. Berggren.

That a cause of forfeiture existed for a considerable period prior to June, 1880, is clearly shown by the proof. The

vendor, however, had not availed itself of the privilege, and so long as it failed to do so the right of the vendee to the possession of the land continued. In this case he had actual possession, by his tenant, who had sown the wheat in the spring of 1880, a portion of the product of which is the matter in controversy in this case.

At common law, which prevails in this state, a tenant who sows or plants a crop, where it is not possible for him to know that his estate will terminate before the crop can ripen, and it does terminate before, is entitled to harvest and secure the crop at maturity. This rule is applied to tenants for life and tenants at will, unless the title under which they claim contains some express provision to the contrary. Co. Litt., 556. 2 Bla. Com., 122. 1 Cruise Dig., 109-110. *Whitmarsh v. Cutting*, 10 John., 361. *Bain v. Clark*, 10 John., 428. Bingham on Real Estate, 539.

In *Stewart v. Doughty*, 9 John., 108, where A let to B a farm for six years, and it was agreed that either party might put an end to the lease on giving to the other six months' notice; but if A gave notice to B to quit, he was to allow B for preparing the ground for seed, and for any extra labor, etc., in the autumn of 1884 B sowed the ground with wheat, rye, etc., and in the February following A gave notice to B to quit. The court held that as the lease had been terminated by the lessor while the crops were in the ground, the lessee was entitled to emblements. It is said (p. 112): "The doctrine of emblements is founded on the clearest equity and the soundest policy, and ought to receive a liberal encouragement."

In *Debow v. Titus*, 5 Halstead, 128, a minister being the tenant of the parsonage land, and while in possession sowed the land with grain, and then sold the crop, but before the grain was ripe voluntarily ceased to be pastor of the church, but left the premises and removed to another congregation, it was held that the purchaser could not recover

 Merriam v. Gordon.

the crop. It is said: "He who has an estate or interest in lands, the duration of which is uncertain in point of time, and he who has such an estate as may perhaps continue until the grain is ripe, shall, if he sows the land, be permitted, or his executors or administrators in case of his decease, to enter upon it and harvest and reap the crop," unless by his own act he terminates the tenancy.

In this case, although a cause of forfeiture existed at the time the wheat in question was sown, still there had been no actual forfeiture, and his estate continued until such forfeiture took place. The plaintiff therefore had a right by his tenant to sow the wheat in question, and his estate being terminated after said crop was sown, but before it was ripe, he was entitled to harvest the same.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

SELDEN N. MERRIAM, PLAINTIFF IN ERROR, V. THOMAS
B. GORDON, DEFENDANT IN ERROR.

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| 47 | 799 |

Practice in Supreme Court: CORRECTION OF MANDATE. An action against a non-resident defendant was instituted in the district court, the purpose of which was to set aside a treasurer's tax deed. Service of summons was made by publication, and no appearance being made by defendant, a decree was rendered as prayed. Within five years after the decree the defendant appeared and, under the provisions of section eighty-two of the civil code, sought to set aside the decree and make his defense. Notice of his motion was served upon the attorney of record of the plaintiff in the original action. This service was quashed by the district court for the reason that it was not served upon plaintiff personally. Upon review by the supreme court, the

Merriam v. Gordon.

decision of the district court was reversed and the cause remanded, with directions to said court to "reinstate the cause and try the issues presented by the answer of said Merriam, and proceed to final judgment in said cause according to law." Upon the return of the cause to the district court, plaintiff filed "counter affidavits" tending to prove that the defendant had actual knowledge of the pendency of the action in time to have made his defense. Defendant moved to strike these from the files, assigning as the basis of his motion the direction of the supreme court as evidenced by the mandate. Pending this motion plaintiff, by motion, called attention of the supreme court to the irregularity of the mandate in its directions to the district court to "try the issues," etc., instead of the usual form, "to proceed with the case according to law"; whereupon it was ordered that the mandate be corrected accordingly. The corrected mandate being returned to the district court, it overruled the motion to strike the counter affidavits from the files, and upon a hearing of the affidavits it was found that defendant had notice of the pendency of the action, and his motion to open the decree was denied. *Held*, No error; that the correction of the mandate having been made before the final hearing of the motion, it was authority to the district court to proceed as it did. *Held, further*, That the direction contained in the original mandate and opinion was not the application of a legal principle binding upon the supreme court as an adjudication, to be corrected only by a rehearing, but simply a misdirection, which might have been corrected by the court on its own motion had attention been called to it.

ERROR to the district court for Cass county. Heard below before POUND, J.

S. P. Vanatta, for plaintiff in error.

Chapman & Polk, for defendant in error.

REESE, J.

The original action in this cause was instituted in the district court of Cass county by defendant in error in the year 1878. The purpose of the suit was to procure the cancellation of certain tax deeds which had been executed to the lands described in the petition. Service was had by

publication. A default was entered and decree rendered in accordance with the prayer of the petition.

On the 7th day of April, 1884, and within four years from the date of the decree, the defendant in the action (plaintiff in error here) filed his motion to open the judgment and decree, under the provisions of section eighty-two of the civil code, and defendant in error being a non-resident, he served notice on the attorney of record for defendant in error. At the same time he filed an answer to the petition.

At the next term of the district court defendant in error moved to quash the service of notice to open the decree, and assigned for ground of the motion the fact that service had been made on the attorney and not upon himself. This motion was sustained by the district court, but the decision was reversed by this court. *Merriam v. Gordon*, 17 Neb., 325. And the cause was remanded. Upon its return to the district court it was found that, following the opinion, the mandate directed the district court to "reinstate the cause and try the issues presented by the answer." This decision was made on the 11th day of March, 1885. On the 8th day of October, 1885, a motion was made in this court to change or correct the mandate so that it might direct the district court to proceed with the cause in accordance with law, omitting the specific instruction to reinstate the cause and try the issues presented by the answer. This motion was, of course, sustained and the correction made. The writer hereof, in writing that opinion, without proper reflection, made use of the language referred to, and the mistake was not noticed by the other members of the court until attention was called to it. It is very clear that the fullest extent to which the court could rightfully go was a simple reversal of the judgment of the district court, with directions to proceed with the cause.

Upon the receipt of the corrected mandate the district court very properly considered that the cause was before

it in the same condition in which it left it on the former appeal, except as to the ruling on the motion to quash the service which had been reversed. Over the objections of plaintiff in error it permitted defendant in error to file counter affidavits (as was his right under section eighty-two, *supra*), showing the actual knowledge of plaintiff in error of the pendency of the original action prior to the decree, and for that reason the decree should not be opened. Plaintiff in error sought to strike these affidavits from the files, relying on the direction from this court requiring a trial. His motion for that purpose was overruled, the finding on the proofs was against him, and the motion to open the decree was overruled. Of this he complains.

The question presented is as to the effect of the decision of this court in so far as it would deprive defendant in error of his right to make proof of the knowledge of plaintiff in error of the pendency of the action in time to make his defense before the decree. It is not material as to what might have been the effect had the mandate not been corrected, for the correction was made before the final action of the district court was taken. As to the language contained in the opinion, it would be without effect upon the case except so far as it might mislead counsel. It contained no declaration of any principle of law as applicable to the case, and the mandate to the district court would have to be its guide. It was not an adjudication which could only be corrected by a rehearing, nor was it the announcement of a legal principle from which the court could not recede. It was simply an oversight, and one which, it seems to us, the legal mind would readily detect as such, and as one which the court could and should correct upon its own motion as soon as discovered.

We think the district court was correct in its decision to hear the affidavits presented, and its orders are affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JACKSON ROBERTS, PLAINTIFF IN ERROR, V. ADAMS
COUNTY, DEFENDANT IN ERROR.

Taxes: LIABILITY OF COUNTY FOR ILLEGAL SALE. Where the treasurer of a county has sold lands for taxes which were not taxable and upon which no tax was due, the county is to hold the purchaser harmless by paying him the amount of principal, interest and costs. *Roberts v. Adams Co.*, 18 Neb., 471.

ERROR to the district court for Adams county. Tried below before MORRIS, J.

Batty & Castro, for plaintiff in error.

L. J. Capps, for defendant in error.

MAXWELL, CH. J.

In August, 1883, the plaintiff filed his petition in the district court of Adams county, in which he alleges "That on April 1st, 1879, the county commissioners of defendant furnished the assessor of Little Blue precinct a list of land supposed to be taxable in said precinct; that said list erroneously contained the northwest quarter of the southeast quarter of section twenty-nine, town five, range ten, in Adams county; that the assessor valued said land at \$140 and returned said valuation with other lands to the county clerk, on the 1st Monday in June, 1879. That said clerk extended the taxes of 1879 against said land as follows, to-wit, total \$439; that said tax not having been paid, became delinquent on the 1st day of May, 1880; that on the first Monday in November, 1880, the land was offered for sale by the treasurer and returned 'not sold for want of bidders'; that on the 16th day of November, 1880, the plaintiff bought said land at private sale of said treasurer for said delinquent tax of 1879, and paid therefor the sum of \$5.35.

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| 20 | 412 |
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| 96 | 682 |
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| 20 | 409 |
| 28 | 812 |
| 20 | 409 |
| 84 | 847 |

"That there was no tax due against said land at the time of said sale, for the reason that said land at the time of said assessment belonged to the general government and was not liable to taxation.

"That said land was wrongfully placed upon the tax list, and wrongfully assessed and wrongfully sold, and that on account of wrongfully putting said land on the tax list, and wrongfully assessing and selling the same, the defendant became liable to the plaintiff for the amount so paid by him as aforesaid, to-wit, the sum of \$5.35 with interest at the rate of twenty per cent per annum from Nov. 16th, 1880." There are forty-nine causes of action stated in said petition, substantially the same as the above, varying only in dates and amounts.

"The aggregate amount claimed by the plaintiff in said petition is \$412.16, for which he claims a judgment with interest at 20 per cent from April 5th, 1883.

"No testimony was offered by either party, but the attorneys for the plaintiff and defendant stipulated in open court that as to each and every count in the plaintiff's petition the treasurer had made an entry opposite each tract of land mentioned in the petition, on the record of sales, that the same was erroneously sold. Upon that stipulation the case was submitted to the court, and on March 20th, 1884, the court made an order appointing L. J. Capps referee to compute the amount due on the several claims set forth in the petition as follows:

"First. The amount due on the principal with 12 per cent interest.

"Second. The amount due on the principal with 20 per cent interest for the first two years subsequent to the payment of said principal and 12 per cent thereafter.

"That on November 10th, 1884, the referee made and filed his report in writing.

"That on November 19th, 1884, the court found for the defendant and dismissed the action at the costs of the plaintiff."

Sec. 131 of the revenue law provides that, "When by mistake or wrongful act of the treasurer or other officer, land has been sold on which no tax was due at the time, or whenever land is sold in consequence of error in describing such land in the tax receipt, the county shall hold the purchaser harmless by paying him the amount of principal, interest, and costs to which he would have been entitled had the land been rightfully sold," etc. Comp. Stats., Ch. 77.

The statute applies to all cases where land has been sold for taxes when no taxes were due thereon. The county, through its treasurer, by offering a tract of land for sale for the taxes claimed to be due thereon, in effect says to the purchaser, that the land offered for sale was taxable, and the taxes have not been paid. Honesty and fair dealing require that a county, no more than an individual, shall be permitted to obtain and retain money paid under a mistake of fact. Our statute has guarded the rights of a tax purchaser so that he may recover the purchase money with interest, but if the lands were not taxable or no taxes were due thereon, the purchaser would be unable to enforce his lien for taxes. Hence the statute requires the county "to hold the purchaser harmless by paying him the amount of principal, interest, and costs." It is clear that the county is liable in this case, and the court should have so found. The judgment of the court below is reversed, and the cause remanded for further proceedings. *Roberts v. Adams Co.*, 18 Neb., 471.

REVERSED AND REMANDED.

THE other judges concur.

JOHN H. ROBERTS, PLAINTIFF IN ERROR, V. ADAMS
COUNTY, DEFENDANT IN ERROR.

MAXWELL, CH. J.

The issues in this case are the same as in *Jackson Roberts v. Adams County*, just decided, and the same decision will be entered. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

WOODWARD & STEARNS, PLAINTIFFS IN ERROR, V
ADAMS COUNTY, DEFENDANT IN ERROR.

MAXWELL, CH. J.

The questions involved in this case are similar to those in the case of *Jackson Roberts v. Adams County*. It is therefore unnecessary to state our reasons for the decision. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

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| 90 | 413 |
| 58 | 382 |

JOHN G. FRITZ AND PAULINA FRITZ, PLAINTIFFS IN
ERROR, v. CRIST GROSNICKLAUS, DEFENDANT IN
ERROR.

1. **Action quia timet.** Petition in an action to quiet title examined and *Held*, to state a cause of action.
2. **Pleading: DEMURRER.** The filing of a demurrer to a pleading is a waiver of the right to file a motion for an order requiring the pleader to make the allegations of the pleading assailed more definite and certain.
3. **Judgment: DEFAULT.** A motion, after judgment, to set aside a default should be accompanied by an answer showing a defense to the action. If not, and no defense is sought to be shown, the motion should be overruled.

ERROR to the district court for Holt county. Tried below before TIFFANY, J.

Utley & Small, for plaintiffs in error.

Kinkaid & King, for defendant in error.

REESE, J.

This is a proceeding in error to the district court of Holt county.

The first question presented for decision is as to the alleged error of the district court in its ruling upon a demurrer to the petition of defendant in error, who was plaintiff below.

The petition is as follows :

" 1st. The plaintiff for cause of action states the facts to be that on the 13th of May, 1881, he purchased, and thereby became the owner of, the northeast quarter of section thirty-two (32), township twenty-nine (29), range eleven (11) west sixth principal meridian, in Holt county, Nebraska.

" 2d. That, at the time of said purchase, plaintiff and

one David L. Ludwig were contemplating a co-partnership to carry on a general milling and other kindred business in Holt county, Nebraska, the members of which were the said plaintiff and said David Ludwig, and no others, in the said contemplated company. Partnership was to be Grosnicklaus & Co., but said partnership at the time of said purchase had not been formed.

"3d. That plaintiff, supposing at the time of said purchase that said contemplated partnership would be formed, and, to save the expense of recording said property, had said real estate deeded to Grosnicklaus & Co., to inure to the use of said partnership when it should be formed, as was then contemplated.

"4th. That the plaintiff paid the entire purchase price of said lands from his own individual funds.

"5th. That said contemplated co-partnership between plaintiffs and said David Ludwig was not, at the time of said purchase, nor at any time prior or subsequent thereto, actually formed, and no such co-partnership has ever in fact existed.

"6th. That the defendants now claim title, the nature and extent of which is unknown to plaintiff, in and to said premises by virtue of a partnership formed between the said plaintiffs and the said defendants herein and one Anna Grosnicklaus; but said partnership was formed long after the purchasing of said lands by plaintiff, and that neither of said defendants have any title or interest in said land or any part thereof.

"7th. The plaintiff further says that the claim of said defendants to title of said land casts a cloud upon the title of this plaintiff to said land.

"8th. The plaintiff further says that he is the absolute owner of said land in fee simple, and defendants have no right or title in the same. First. Plaintiff therefore prays that each of said defendants may be summoned to appear and show cause why the title of plaintiff should not be

quieted in and to said lands. Second. That on the final hearing of this cause this plaintiff be decreed to be the absolute and sole owner of said premises, and that upon the final hearing of said cause said defendants and each of them be perpetually enjoined from having or claiming any interest or title in and to said premises or any portion thereof, and that plaintiff have such other and further relief as may be just and equitable.

The grounds for demurrer are that the petition does not state facts sufficient to constitute a cause of action, and that "it does not appear from the facts stated that there is any cloud on plaintiff's title."

The demurrer was overruled.

It is insisted that the petition fails to state a cause of action in that it does not contain any averments describing the character of the alleged claim of plaintiffs in error, nor that they have no title or interest in the land described in the petition.

It must be conceded that the petition is not skillfully drawn, and is not as full in its averments as might be desired by a careful pleader; but we think that by the application of the liberal rules which prevail, under the code, for the construction of pleadings (*Humphries v. Spafford*, 14 Neb. 489. Sec. 1 Civil Code), the petition is sufficient. By it we are informed that plaintiff and one Ludwig contemplated the formation of a partnership, the firm name or style of which was to be "Grosnicklaus & Co."; and that for the benefit of said firm plaintiff purchased the real estate described, with his own means; but to avoid any further expense in conveying the title to the new firm when formed, he caused the deed to be made so as to convey directly to it. This partnership was never created, and therefore did not take title. That defendants (plaintiffs in error here), one Anna Grosnicklaus, and defendant in error, afterwards formed a partnership, and that by virtue of this partnership relation "the defendants now claim title to the

land, the nature and extent of which is unknown to plaintiff. * * * But said partnership was formed long after the purchase of said lands by plaintiff, and that neither of said defendants have any title interest in said lands, nor any part thereof." This is sufficient. If plaintiffs in error have no interest nor title to said land, but, by reason of their partnership relation to defendant in error, and the peculiar language of the deed in question, are asserting a title, it would afford ground for relief. It is claimed that the petition should allege the terms of the partnership, and whether or not it still existed, etc. We cannot see that either of these facts could become essential or material if the real estate did not enter into or become a part of the partnership property. But suppose these allegations were necessary in order to render the petition more definite and certain as to the exact cause of action sought to be stated, the proper remedy would have been a motion for a more specific statement, made before filing the demurrer.

After the demurrer had been overruled, a day was fixed upon, on or before which plaintiffs in error were required to plead to the petition. Instead of answering to the merits of the petition, plaintiffs in error filed a motion asking an order requiring defendant in error to make his petition more definite and certain in the following particulars: "To state in the sixth paragraph of his petition the date at which the partnership was formed, the names of the persons to such partnership, the terms and conditions of such partnership, whether such partnership is still existing or not, and if dissolved, the terms of such dissolution." This motion was stricken from the files upon the application of defendant in error, and this ruling is assigned for error. The holding was correct. The filing of the demurrer was a waiver of the right to file a motion for a more specific statement. Maxwell's Pl. and Pr. (1885 ed.), 167. *Savage v. Challis*, 4 Kas., 319.

After disposing of the motion for a more specific state-

Ex parte Cross.

ment, a default was entered against plaintiffs in error, and on the same day the proofs were heard and a decree rendered in favor of defendant in error, in accordance with the prayer of his petition. Three days afterwards plaintiffs moved the court to set aside the decree, assigning twelve grounds or reasons for the motion, all of which were the alleged errors of the court in the rulings above referred to, and in its findings of fact on the trial, as well as in rendering the decree. No answer was presented, and no intimation was given as to whether a defense to the action existed. This was necessary.

The motion was overruled, and we think the ruling was correct.

The decree of the district court is affirmed.

DECREE AFFIRMED.

THE other judges concur.

EX PARTE JESSE CROSS.

Jurisdiction: INDIAN RESERVATIONS. The courts of this state have no authority to prosecute and punish one Indian for a crime committed against another on the reservation to which they each belong, so long as they maintain their tribal relations.

ORIGINAL application for writ of *habeas corpus*.

J. L. Caldwell, for relator.

G. M. Lambertson, for respondent.

REESE, J.

This is a petition for a writ of *habeas corpus*, presented by Jesse Cross, who alleges that he is unlawfully restrained

of his liberty by W. P. Rathburn, the sheriff of Dakota county. The allegations of the petition are, in substance, that the petitioner was arrested under a warrant issued by the county judge of Dakota county upon a complaint accusing him of the crime of horse stealing, and upon a preliminary examination was held to bail to await the action of the grand jury to be convened at the next term of the district court within and for that county, and in default of bail has been committed to jail. The petitioner is a Winnebago Indian, residing on the Omaha and Winnebago reservation in this state. He is accused of stealing a horse from one George Minnick, who is a member of the Omaha tribe, and residing on the same reservation. These two tribes are consolidated under one agency, known as the Omaha and Winnebago Agency. The tribal relations existing among said Indians has never been dissolved, and still exists as between the parties named and their tribes. The alleged crime was committed on the reservation. The sheriff filed a general demurrer to the petition.

The question presented is, whether or not the state courts have jurisdiction over an Indian for an offense committed against another Indian on their reservation, under the circumstances named.

The case was presented by counsel who had given the subject careful attention, and who displayed quite a considerable degree of ability in the argument and in the preparation of briefs; but soon after the submission, it was made known to the court that the restraint had been removed and the petitioner was no longer held a prisoner, and the further consideration of the case was abandoned, the cause still remaining on the docket.

Since the question here involved has been decided by the Supreme Court of the United States in an opinion written by Judge Miller, of that court, and filed on the 10th day of May, 1886, we deem it proper to refer to that decision as being the holding of the court of last resort, and pos-

sessing appellate jurisdiction over this court, upon the question presented, and thus dispose of the case. See *United States v. Kagarua*, 23 Cent. Law Journal, 420.

In that case it is held that the state courts have no jurisdiction over the Indians within the state, and on their reservations, for crime committed by and against each other, so long as they maintain their tribal relations. It is true that the decision is based upon an act of Congress passed after the arrest of the petitioner, and therefore might not be decisive of the question involved in this case, did one exist, yet as it declares the law as it is and has been since the taking effect of the act, to wit, March 3, 1885, and is now by the terms of the act and the construction given it by the highest court of the nation, the law of the land, we acknowledge its authority. We also fully approve of the reasoning of the learned judge who wrote the opinion.

The case at bar will be stricken from the docket.

JUDGMENT ACCORDINGLY.

THE other judges concur.

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| 90 | 419 |
| 54 | 103 |

STATE OF NEBRASKA, EX REL. J. R. WEBSTER, v. BOARD
OF COUNTY COMMISSIONERS OF LANCASTER COUNTY.

1. **COUNTIES: REFUNDING BONDS: CONTRACT WITH ATTORNEY.**

One W. claimed to have discovered that certain bonds issued to railroads by L. county, drawing ten per cent interest and supposed to have many years to run, were payable "on or before" the ultimate date of payment at the option of the county, and that they could be refunded with six per cent bonds. He thereupon entered into a contract with the county commissioners of said county to procure the refunding of said bonds for a certain per cent of the proceeds to be retained by him. *Held*, That the commissioners had no authority to enter into such contract, and that it was void.

2. ———: COMPENSATION OF AGENT. Where a county employs an agent to refund its bonds, and before the revocation of the authority he necessarily performs labor and expends money in the prosecution of the business from which the county derives benefit, he is entitled to a fair compensation for said labor, and the repayment of said money.
3. Referee : PRACTICE. Where a party desires a referee to find additional facts he should file a motion for a further report.

ORIGINAL application for mandamus.

J. R. Webster, relator, *pro se*.

W. J. Lamb, for respondents.

Mason & Whedon and *D. G. Courtney*, for intervening parties.

MAXWELL, CH. J.

This is an original action to compel the defendants to to pass upon a claim of relator filed with said board for money alleged to have been expended, and for certain labor alleged to have been performed by him in the refunding of the bonds of Lancaster county. The cause was referred to Hon. W. H. Munger to take testimony and find the facts, and he has made a report, as follows :

“In pursuance of an order of this court, appointing the undersigned sole referee to find and report the facts at issue in this case, I took the oath required by law, and fixed the 23d day of March, 1886, at the office of the county clerk of said county, as the time and place for hearing, and notified the parties thereof.

“At the time and place above stated, I proceeded to the trial of the matters above referred to me, the relator appearing in person, and the respondents by Walter J. Lamb, their attorney, and the intervenors, by O. P. Mason and D. G. Courtney, their attorneys, and after hearing the evi-

dence offered by the parties and the arguments of their attorneys, I find the following facts :

" 1st. That at the several dates hereinafter mentioned, and for several years prior thereto, the relator was a practicing attorney in the city of Lincoln in said state.

" 2d. That on the 1st day of May, 1871, the said county of Lancaster issued to the Midland Pacific Railway Company three hundred bonds with interest coupons attached, each bond for the sum of five hundred dollars, to aid in the construction of the railway of said company from Nebraska City, in the county of Otoe, to J street, in Lincoln, in Lancaster county, Nebraska.

" 3d. That on the 1st day of January, 1878, the said county of Lancaster issued to the Midland Railway Company two hundred bonds with interest coupons attached, each bond for the sum of five hundred dollars, to aid in the construction and completion of the railway of said company from the city of Lincoln, in the county of Lancaster, to the Union Pacific Railroad, in said state.

" 4th. That each and all of said bonds bore interest at the rate of ten per cent per annum, payable annually.

" 5th. That all of said bonds were issued in pursuance of propositions adopted by the electors of said county, pursuant to the several acts of the legislature of the state of Nebraska in such cases made and provided.

" 6th. The proposition so adopted by the electors of said county under which the first series of said bonds were issued, provided that said bonds should be payable 'on or before the expiration of twenty-five years from the 1st day of May, 1871.'

" The proposition so adopted by the electors of said county under which the second series of said bonds were issued, provided that said bonds should be payable 'on or before the expiration of thirty years from the date thereof.'

" 7th. The first series of said bonds contained a recital that the same were payable 'on or before the 1st day of May, 1896.'

"The second series of said bonds contained a recital that the same were payable 'on or before the first day of January, 1903.'

"8th. A copy of said propositions so adopted by the electors of said county were duly spread upon the commissioners' records of said county.

"9th. No copy of the bonds of either series was preserved among the records of the commissioners' or county clerk's office.

"10th. A copy of the first series of said bonds was recorded in the office of the auditor of state of the state of Nebraska, but no such copy was recorded of the second series of said bonds.

"11th. That the bond register of said county showed that the first series of said bonds matured May 1st, 1896, and that the second series of said bonds matured January 1st, 1903, but did not show that the same were payable 'on or before' said dates.

"12th. The interest on both series of said bonds had been paid down to and including the first day of January, 1884, the principal being outstanding and unpaid.

"13th. On the 11th day of January, 1884, the relator addressed the board of county commissioners of said county the following letter :

" 'JANUARY 11th, 1884.

" 'To the Board of County Commissioners, Lancaster County, Nebraska :

" 'GENTLEMEN—I have devised a plan by which I can obtain a surrender of some portion of the outstanding county bonds not due, at par, and fund the same into a lower interest bond, without bad faith or repudiation. Some of the bonds I can force in without expense to the county, or any weakening of its good credit and good name.

" 'I propose to do so for one-sixth part of the sum saved. I desire this may be kept confidential until you may deter-

mine what you will answer, and until after you have conferred and advised with me on the matter.

“ ‘Respectfully,

“ ‘J. R. WEBSTER.’

“14th. Negotiations were thereafter had between relator and the board of county commissioners of said county until the 3d day of March, 1884, when a contract was entered into between relator and said board of county commissioners, which contract was spread upon the commissioners’ record of said county, and contained, among other recitals, the following:

“ ‘Whereas certain outstanding bonds of Lancaster county, Nebraska, hereinafter mentioned, were voted to be issued, and were issued, payable on or before their dates of maturity; and whereas J. R. Webster desires authority to undertake, on behalf of the county, to recall and redeem such bonds, without expense or hazards of cost to the county, and agrees to be at the expense and trouble to discover the whereabouts of the holders thereof, and notify them, the said bonds are called in by said county, and are now payable. Now, therefore, be it

“ ‘Resolved, By the board of county commissioners, that J. R. Webster be and he is hereby authorized, for the purpose and upon the conditions aforesaid, to act as agent of the county of Lancaster in the premises.

“ ‘2. Resolved further, That the issue of bonds dated May 1st, 1871, in the sum of \$150,000, to the Midland Pacific R. R. Company, also the issue of bonds dated January 1st, 1873, in the sum of \$100,000, to the Midland Pacific R. R. Company, with accrued interest on each of said bonds to May 1st, 1884, be and the same are declared due and payable at the county treasury May 1st, 1884, and after May 1st, 1884, interest on said bonds and each and every one of them shall cease.

“ ‘4. Resolved, That for the purpose of raising money with which to redeem said bonds so called, there be executed

and negotiated six per cent interest bonds; said bonds to be negotiated, but not delivered or issued, until old bonds in like amount are surrendered to county treasurer; none of said bonds to be negotiated or sold at less than their par value. And for his compensation for services in and about this business said Webster shall and is hereby allowed the premium which said bonds on negotiation may bring, without other claim than such premium for any service rendered, for any expense incurred, or for any disbursement of moneys required to be made in any way connected with or arising out of the matter of calling in said outstanding indebtedness or bonds, or of the funding of the above, these series of bonds, or the negotiation or sale of the same.

“ ‘The authority of said Webster to terminate one year from this date; and the said J. R. Webster accepts such employment on the above terms, and binds himself to the diligent and faithful performance of said service, and now agrees to hold the county harmless for all costs and expenses, from litigation or otherwise, that may or can in any way arise out of the said matter.’

“15th. That prior to the time relator addressed his letter of January 11th, 1884, to the said board of county commissioners, it was not known by said commissioners that said bonds were made payable ‘on or before’ the date of maturity; but after the receipt of said letter, and before said contract was entered into, such investigation was made as resulted in their learning the form of the first series of said bonds, and that the same were made payable ‘on or before’ the date of maturity; but said commissioners did not know the form of the second series of said bonds, or whether they were optional, until some time after the execution of said contract (although it is recited in the contract that they were all payable ‘on or before’).

“16th. That prior to the execution of said contract, relator solicited various citizens and tax-payers of said county

to advise the said board of commissioners as to the propriety of making a contract with said Webster for the purpose of funding said bonds. That several of such persons wrote letters to said commissioners stating, in substance, that in their opinion it would be for the best interest of the county to fund such bonded indebtedness, and in their opinion relator's proposition was a fair and reasonable one. That some of said letters were written under the impression and belief on the part of the writers that said bonds were voted optional but issued absolute in reference to time of payment. But relator did not state to any of the persons who wrote such letters that the bonds were issued absolute, and relator did not know whether the second series were issued absolute or conditional until some time after the execution of said contract; but he did know that the first series was issued conditional before the execution of the contract.

"17th. That in the month of January, 1884, and before said contract was entered into, the board of county commissioners employed Walter J. Lamb as the attorney for said Lancaster county for the year 1884, at the agreed price of \$50 per month (\$600 per year); that during all of said year 1884 said Lamb acted as the attorney for said county, and attended all the meetings of said board of commissioners, and advised them generally upon all matters, and was paid the price above stated therefor.

"18th. That in pursuance of said contract, and after the same was entered into, relator prepared form of call of said bonds, with resolutions for entry upon the commissioners' journal, and prepared form of new bond to be issued. He obtained the names and addresses of the holders, or nearly all, of such bonds, served notices personally on many of the holders, and on banking institutions through which the interest coupons had been collected, and made the call as generally known as possible. He visited many places where such bonds were held, for that purpose leaving home on or about

the 3d of April, went to Baltimore, Philadelphia, New York, Boston, and Manchester, N. H., saw many of the holders, and notified them for the most part; so that between the first of May and the middle of July, 1884, nearly the entire amount of the \$250,000 was presented for payment, he being absent about three weeks. He also, at the suggestion of said board of commissioners, prepared and printed a prospectus or circular about the new issue of bonds and call of old bonds, which was approved by said board. His expenses, paid out in the printing above referred to, stationery, expressage, traveling expenses, in and about the foregoing matters, amounted to the sum of \$453, no part of which has been paid him.

"19th. That on the 25th day of April, 1884, a suit was commenced in the district court of said county by one Wm. C. Griffith, against the commissioners of said county, the county clerk, county treasurer, and county attorney, the object and prayer of which was to restrain the issue of said funding bonds. The petition in said act on reciting the said contract between relator and said board of county commissioners, a temporary order of injunction was granted in said action.

"20th. That thereafter, on the 25th day of April, 1884, relator stated to said board of commissioners that his construction of the pleading and object of the Griffith action in its legal interpretation was not to prevent the funding of the bonds, but to prevent their being funded under the contract, and his compensation for the premium that they might bring; that to wait and litigate that matter would cause the county a large loss in difference of interest, and that the interests of the public in effecting the funding operation and saving default upon its call was, to his mind, a matter of paramount importance to his individual interest. He at the same time tendered a rescission of the contract by a written communication, in which written communication, among other things, he said: "In regard to

my own compensation, in case these suggestions are adopted, for services already done, in giving information of the redeemable character of these outstanding tens, and advice therewith connected, I will leave that wholly to the discretion of the board at a future time to adjust.'

"That thereafter, on the 25th day of April, 1884, at a session of said board of commissioners, an agreement was entered into between relator and said board of commissioners, which agreement was spread upon the commissioners' record, and was in words as follows:

" 'OFFICE OF THE CLERK OF LANCASTER }
COUNTY, NEBRASKA. }

" 'The board of commissioners of said county being in session, and having the matter of the proposed refunding of certain outstanding bonds under consideration, as well as a proposition and contract made and entered into by and between the board and one J. R. Webster, said agreement being recorded in commissioners' record "E," at page 32, and his rights under said contract being by said J. R. Webster waived by his report filed April 26th, 1884, make the following order in the premises, that is to say, that said contract be and the same is hereby rescinded, and the said J. R. Webster concurs in this action.

" 'Dated at Lincoln, April 29th, 1884.

" 'H. C. RELLER,

" 'W. J. WELLER,

" 'W. E. CALDWELL,

" 'County Commissioners.

" 'J. R. WEBSTER.'

"21st. That such proceedings in said suit brought by said Wm. C. Griffith were had that on the 30th day of March, 1885, at a session of the district court of said Lancaster county, a decree was rendered in said action as follows:

" 'And now on this day this cause came on for final hearing before the court, the same having been previously

argued and submitted, and upon consideration the court doth find the issues in this cause in favor of the plaintiff, and that at the commencement of this action the temporary order of injunction allowed herein was properly and rightfully allowed, and the said court doth further find that since the commencement of this action, the contract sought to be enjoined, and which was enjoined by the temporary order of injunction allowed herein, has been by the parties thereto annulled and cancelled and abrogated, and there is no necessity for any further order or decree in the premises, and the said petition is dismissed, and the parties hereto go hence without day, and it is further considered, ordered, adjudged and decreed, that said suit be dismissed, and that the plaintiff pay one-fourth of the costs, taxed at \$130.60, and the said defendants three-fourths of the costs herein, taxed at \$91.75, and that execution issue therefor; and it is further ordered, adjudged, considered and decreed, that the principal and securities on the injunction bond, given in this cause, be and are hereby released, and forever discharged from liability thereon.'

"22 d. That prior to the time relator addressed his first letter to said board, Jan. 11, 1884, it was not known by said board of commissioners that any of said bonds could be funded, that by reason of the letter thus written by relator and the contract entered into between him and the said board, such investigation was had as led to the finding out that said bonds were payable 'on or before' the final date of maturity. That by reason of the action of the relator in having the call for payment made in finding out the names and residence of the holders and service of notices for redemption, the first series of said bonds were finally redeemed and the new funding bonds issued therefor, bearing interest at 6 per cent per annum, which funding bonds were sold to the state of Nebraska at par and the money used in payment of said first series of

bonds. But said matter was not completed and such sale to the state of Nebraska was not finally consummated until after the rescission of said contract, April 29, 1884.

" 23d. Relator rendered no further services for said county after the rescission of said contract.

" 24th. That a large portion of said second series of bonds were under said call presented for payment, but at the suggestion of certain tax payers that said second series were illegal, the said board on the..... day of....., 1884, ordered no further payment of interest, and no payment of principal to be made until the validity of the same should be judicially determined.

" 25th. That by reason of the funding of said first series of bonds, from a 10 per cent to a 6 per cent interest bond the annual debt charge of said county was reduced \$6,000.

" 26th. The services rendered by relator, as before stated under said contract were of benefit and value to said county.

" 27th. On the eighth day of May, 1884, relator filed with the county clerk of said county his bill for services and expenses, a copy of which is set forth in his information in this case, which said bill was duly verified by the oath of said relator.

" 28th. Relator has not been paid anything for his said services or expenses rendered and expended as before stated.

" 28½. The services rendered relator, as above stated, were not voluntary, but under the agreement and expectation that he would receive compensation therefor.

" 29th. The said board of county commissioners have failed and refused to take any action whatever upon said bill of relator.

" 30th. In January, 1884, the board of county commissioners, in their estimate of revenue required for bonded debt for fiscal year, estimated, and in July following levied

taxes to pay the interest on said two series of bonds in the sum of \$25,000.

"31st. In January, 1885, the county board did not include the bill of claim of relator for services and expenses so rendered in their estimate of expenses.

"32d. No judgment at law had been rendered, adjudging said two series of bonds so proposed to be redeemed valid and legal.

"33rd. No vote of the electors of said county was had upon the question of the issuing of said proposed refunding bonds, or for the redemption of the first and second series of the Midland Pacific bonds.

"34th. There is no fraud or collusion between relator and the board of county commissioners in the matter of making a proper defense to this action.

"All of which is respectfully submitted,

"WM. H. MUNGER,

"Referee."

The defendants except to finding No. 16, for "That the referee did not state any persons who wrote such letters, that the bonds to be refunded were issued absolute as to time of payment." The principal objection made is that it is supported only by the testimony of the relator himself; and that it is contradicted by the positive statements of three witnesses named. In our opinion, however, the evidence is sufficient to justify the referee in making the finding objected to.

Exceptions are also taken to findings numbered 22, 24, 26, 28, 32, and 34, principally upon the ground in substance that they are against the weight of evidence. Without attempting to review the evidence at length, or give a synopsis of it, we will say, that each of the findings is based upon the evidence, and seems to be supported by it. The careful and capable lawyer who acted as referee in the case has taken a large amount of testimony in the case, which is now before us, and has predicated his find-

ings on such testimony. That the defendants employed the relator as agent to aid in refunding the bonds of Lancaster county at a low rate of interest there is no question, and that in pursuance of such employment he expended his own money and spent several days' time in endeavoring to bring about the refunding of such bonds is undisputed. These services were rendered, too, on the promise of compensation. The county availed itself of this labor and has been benefitted thereby. These services seem to have been necessary on the part of some one employed by the county to enable the county to refund its bonds, and the county having received the benefit of the labor should make a fair compensation therefor, and for the money actually and necessarily expended by such agent in the prosecution of his labors.

While it is true that the powers of a board of county commissioners is derived from the statute, and a contract entered into without authority of law is void, still the law is not to be construed in such a manner as to deprive the county board of the power to pay a reasonable compensation for beneficial labor performed for the county at its request, on the adjustment of its funded indebtedness. This, however, will not include compensation for services as attorney, for the discovery that the bonds of Lancaster county were payable "on or before" the dates named in the proposition. The records of a county ought to be kept in such a manner that the time when its bonded indebtedness would become due, or would be paid upon the exercise of an option to that effect, would readily be ascertained by all tax payers; and it is somewhat remarkable that the defendants, who were charged with the management of the financial affairs of the county, did not examine such record and, if possible, fund the bonds at a lower rate of interest. This certainly was for the interest of all tax payers in the county.

This court, however, cannot permit any one to speculate

on the funds of a county by proffering advice upon a matter of law which is presumed to be known to all. Thus in *Platte County v. Gerrard*, 12 Neb., 244, the defendants had pointed out certain railroad lands to the county commissioners as being taxable, and were to issue certain notices, and give advice in the case for twenty-five per cent. of the taxes collected; but this court refused to enforce the contract. In such case it was the duty of the county board to place such lands on the tax list and to collect and apply the revenue arising therefrom in the manner provided by law; therefore, there was no authority to divert any portion of the same from the county treasury. So in this case the defendants have no authority to employ private parties to refund the county bonds, and divert a portion of the amount received therefor from the public treasury. This, if permitted, would result in gross abuse. The entire amount therefor derived from the sale of such bonds must be paid into the appropriate fund, and applied to the purposes authorized by statute. Where, however, a county has employed an agent to assist in refunding such bonds, who, in good faith relying upon his employment, has spent his time and money in the performance of such labor from which the county has derived a benefit, justice requires that he be paid a fair compensation for such labor, and that the money necessarily expended be repaid to him with interest.

The defendants ask the court to correct and supplement the findings of the referee so that the actual facts may appear. If it was desired to have the referee find additional facts within the order of reference, the proper mode of procedure is by a motion for a further report. The report, however, seems to cover all the questions submitted. A peremptory writ will issue requiring the board of county commissioners of Lancaster county to act upon the claim of the relator so far as the repayment of the money expended by him as above set forth, and to fair compensation for the

labor performed by him for said county, and as to all other matters, the writ is denied.

REESE and COBB, JJ., (*not concurring in full in the above opinion*):

We agree that the writ may issue in this case to require respondents to audit the claim of relator, the amount to be limited to a repayment of the money actually expended by him for the benefit of the county, as found by the referee, to wit, \$453.

JUDGMENT ACCORDINGLY.

JOHN P. COOK, PLAINTIFF IN ERROR, V. HARVEY
PICKREL, DEFENDANT IN ERROR.

Trial: EVIDENCE. The evidence examined and *Held* insufficient to sustain the verdict.

ERROR to the district court for York county. Tried below before NORVAL, J.

France & Harlan and *D. T. Moore*, for plaintiff in error.

Sedwick & Power, for defendant in error.

COBB, J.

This action was brought in the district court by Pickrel against Cook. The petition contains two counts, one of which charges "that * * * the defendant's dogs chased and drove about and worried plaintiff's horses. That by reason thereof the said horses of the plaintiff were greatly

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| 30 | 438 |
| 33 | 591 |
| 20 | 438 |
| 35 | 912 |
| 20 | 433 |
| 37 | 448 |
| 20 | 433 |
| 40 | 188 |
| 20 | 433 |
| 43 | 734 |

damaged and injured so that one thoroughbred brood mare of the value of \$300 was killed, and one thoroughbred colt was damaged in the sum of \$150, and rendered of no value." And the other of which charges, "that said defendant * * * chased and drove about the plaintiff's horses with dogs in a negligent manner, and that in consequence thereof the said horses of the plaintiff of the value of \$1,500 were greatly damaged and impaired, and that one thoroughbred brood mare, by reason thereof, of the value of \$300, was killed, and one thoroughbred colt, the property of the plaintiff, was by reason thereof greatly damaged and injured, and rendered of no value whatever, to the plaintiff's damage \$150, and other horses were injured by reason thereof in the sum of \$150," etc.

The defendant, Cook, on the 7th day of February, 1883, filed his answer in said cause, in and by which he denied "each and every allegation in the plaintiff's petition contained."

It appears from the record that, before trial, there were three preliminary or dilatory motions made by counsel for Cook, all of which were overruled, and the overruling of two of which is assigned as error, and insisted on in the brief of counsel. These assignments cannot be considered, for the reason that, as set out in the record, these preliminary motions seem to have been made after the filing of the answer to the merits. The writer is of opinion that one of said motions, that to require plaintiff to reduce his petition to one count or single statement of his cause of action, would have been sustained had it been made and insisted upon before pleading to the merits. But of course, after a plea or answer upon the merits, and it remains on the files of the case, no motion or application of the character referred to will be allowed.

There was a trial to a jury, with a verdict and judgment for Pickrel, plaintiff. Cook, defendant, brings the cause to this court on error.

There are twenty-six errors assigned, some of which, as we have seen, cannot be considered, for the reason above given; and others, which are based upon the admission of irrelevant and improper evidence offered by Pickrel, and the exclusion of relevant and proper evidence offered by Cook, cannot be considered, for the reason that they are too general, not pointing out the evidence to which they severally refer. Such of the errors assigned as may be considered, and which are deemed sufficient to a proper disposition of the case, will be stated as they are examined and disposed of.

"1. The verdict is not sustained by sufficient evidence."

The evidence preserved in the bill of exceptions is voluminous, consisting of two hundred and seventy written pages, and the cause having been brought to this court before the taking effect of the abstract law, is not abstracted. It will, therefore, be impracticable to present more than a brief *resume* of the evidence here, and that will be confined to the evidence applicable to points considered. Charles Bell, a witness, sworn and testified on the part of Pickrel, that he knows plaintiff and defendant; that he was herding cattle and horses for Pickrel on the day of the injury; he herded the horses just like the cattle. He drove them up a little after 3 o'clock, may-be later. "I got them drove up and went and got a lunch; I went out to get a horse, and got on the horse and saw the horses coming three-fourths of a mile away—come running in. This mare, Angeline, was first. When they come closer and run up, I saw this mare did not come up. I started and rode across some one's field south-west, and I met Eph. Gable and Clarence Lesh. They said—" Here witness was interrupted by plaintiff's counsel, who put to him the following interrogatory:

Q. How carefully did you watch the horses at the time you were herding them there? Counsel for defendant objected to this question as incompetent and irrelevant.

The objection was overruled and witness answered as follows:

A. I herded the horses the same as I herded the cattle. They kept picking around. I had to watch the cattle in the herd. I had twenty-three or four head of horses, fifty-one head of cattle, eighty-three head in all; had no help. They kept trying to get away all the time. I kept rounding them up. They got over in the field out of sight. I did not dare to leave the cattle and go over and follow them. Got into the yard at Pickrel's at — o'clock and drove into the house.

Q. Were you horseback?

A. I was.

Q. State to the jury where you found the mare?

A. In the north-west corner of Mr. Cook's corral, dead.

* * * * *

On cross-examination this witness testified as follows:

Q. How far were these horses from you when you saw them cross (the wheat field)?

A. I judge about three hundred yards.

Q. Where did they go from there?

A. Kept down the draw. The last time I saw them was over on Mr. Moyer's land on the sod next to Tolbert's.

Q. How far were these horses from you when on Mr. Moyer's land?

A. I judge about three-fourths of a mile, probably a little more or less.

Q. Where were the cattle then?

A. With me, where I was herding on the other eighty, I saw both at that time.

Q. Cattle were with you?

A. Yes, sir.

Q. You say the horses were two thirds of a mile away?

A. Yes, sir.

Q. Where did the horses go from there?

A. I could not tell. It was then about two o'clock.

Q. What is your best recollection?

A. I don't remember; in fact I could not tell.

Q. Last time you saw them was about two o'clock, three-fourths of a mile away.

A. Yes, sir.

Q. What did you do then?

A. I took the cattle to the house.

* * * * *

Q. Last time we saw you, you were eating dinner about three o'clock?

A. Call it any way you wish.

Q. When you got home you told him the horses got away?

A. Yes; I told him they got away. Said I better do something right away. Went out to the stable to saddle the horse and started I met these boys. Said that Tolbert was running the horses. Did not go over the whole way. Said he was cursing Harv.'s (Pickrel's) horses. He recognized the teams.

Q. What time was this when he said he recognized the team to be Harv.'s?

A. May-be 4 o'clock.

Q. Where did you go then?

A. Started down that way; I went to Tolbert's place and then down to Cook's.

Q. What did you find out at Tolbert's?

A. I did not see him; went on down.

Q. Was he gone then?

A. Yes; I met him coming back; said he seen no horses; somebody there with him, and he said he saw me out there, and missed the horses.

Q. Where did you meet Tolbert?

A. Coming home right at the four corners of these

lands. I started from Harv.'s about 4 o'clock; drove about two and a quarter miles to Cook's; stopped at Lesh's and looked there.

Q. What time did you look in Tolbert's stable?

A. About 4½ o'clock; I left Harvey's about 4 o'clock, I think.

* * * * *

Q. Did you see Tolbert after your horses?

A. Met him after he said that was it; said he saw the horses on Moyers' land; saw some one out there trying to catch them.

Q. Know who?

A. No, sir.

Q. This about 5 o'clock?

A. Somewhere; Louie saw a man out there, and were going from there; after I saw I drove to Cook's yard; I saw the boy and thought he was likely to know, though was in the barn. Harv. got and looked in the barn; the boy said his mother drove them in the orchard.

Q. Find any tracks?

A. I dont know; I was not with them.

Q. Where were you all this time?

A. In the buggy.

Q. Where was the buggy?

A. In the road.

Q. Going which way?

A. Nearly west past the corral; after he got here he says "drive back" on the west side of the corral, and I did.

Q. Where was the dead horse?

A. Pretty near there, I believe.

Q. Which end of the corral?

A. Northwestern.

Q. Right at the corner?

A. May-be west a rod.

The cross-examination of this witness was continued at great length, but I have quoted sufficient to present the substance of his testimony.

Harvey Pickrel, the plaintiff, was sworn and examined as a witness in his own behalf. After stating that he was acquainted with the defendant, his examination continued as follows :

Q. Were you acquainted with him last April a year ago ?

A. I was.

Q. You may state to jury whether you lost any horses about that time.

A. Yes, sir.

Q. What kind were they ?

A. It was a mare that died ; I had a couple of colts hurt.

Q. What time of the year was it ?

A. I think it was the 16th day of April, 1882 ; I think it was on Sunday.

When did you first discover they were injured ?

A. On Sunday evening.

Q. Where were they at the time that they were injured ?

A. On Mr. Cook's premises.

Q. How did you first discover that the animals were injured ; what first called your attention to it ?

A. In the evening just before sundown the horses that were out come up with the exception of one, and I noticed they had been badly run, and were running when they come up, and I noticed some of them were injured when they come ; one was lame when it come up, and the cuts on one went down to the knee ; this mare was gone when I went down.

Q. State to the jury where you found her ?

A. At Mr. Cook's, right back of the corral lot or pasture.

Q. State what condition she was in ?

A. Well, I went down to his house and asked him if he had seen anything of the horses, and he told me he had.

Q. Did you ascertain where they were ?

A. * * * I went down through the orchard and went in the corral; I saw horse tracks thick, and I saw from the tracks that there had been horses there; he told me before seeing the tracks that my horses had been there, and then told me that the mare was dead over the fence. They tore down the fence when they went over. I found her.

Q. Describe the condition she was in when you found the mare?

A. The fence had been—two posts were broken. The mare had fell, as near as I can tell by stepping about, it was by corn field, about seven rows on below, and broke her neck. We cut in her neck; it was, we all considered, broke; we thought it best to cut it to find out the cause the mare died of.

Q. What was the condition of the fence?

A. The fence was torn down, for it cut the horse; the wire was off and some boards were off.

Q. What kind of a fence was it?

A. It was three boards and one wire; the wire was stretched above the boards about a foot.

Q. What did you observe on the mare at the time you examined her?

A. She had the marks of the wire on her breast and a cut on her nose; it appeared to have struck her there as the mare was getting through; the wire might have turned with her.

Q. Where was the wire in front?

A. The wire, when I first found her, was in front of her; I threw it back.

Q. What then did you observe in and about the colts that Sunday evening?

A. One of the colts was lame, very lame.

Q. What condition was the lot in?

A. There were tracks of dogs and horses, as though they had been running around it.

Q. Were there very many tracks?

A. A good many; looked like they had been around the lot several times.

Q. What direction did they seem to be going.

A. They seemed to come in at the southeast corner, go around the northwest corner, then south, then east, back to where they began to go around, and so on until they went over the fence.

Q. What did you see there besides the horse tracks?

A. I saw dog tracks.

Q. In what direction did they go?

A. In the same direction.

Q. What peculiarity did you notice in reference to the dog tracks?

A. The dog tracks? The ground seemed to be pushed; the tracks dug; the tracks was in the ground from where the dog's foot first struck the ground from six or eight inches to a foot.

* * * * *

Q. State the conversation you had with Cook.

A. * * * He come that way and then I asked him how it happened. He said he put them in the lot to catch them, and the dogs were after them and he could not get them off. They appeared to be afraid and went running so fast, and were so frightened that they went right over the fence and took no notice; when they come there the horses went right over the fence.

Q. Describe the condition of that corral, around it, all around, whether it was the same you described where the mare went over?

A. No, sir. There were parts of the fence that had no wire on. It seemed to be higher on the north. It would be, I think.

Q. What side had wire on?

A. I don't remember whether it had wire on the south side or not. West, I don't think there was wire on it. It had boards around. To the southwest I think it was plowed ground. I think it had been plowed in the fall, and up close to the fence, up about ten feet of it. The horses ran around, right on the inside of that mostly.

Q. Where was the gate the horses come in?

A. On the southeast corner, next the house.

Q. State to the jury whether you observed any other tracks of an animal except that of the horses and dogs near the gate?

A. I observed the tracks of a man that come up to the gate. I judged it was. It looked like a man by the tracks.

Q. What did Mr. Cook say, if anything, after that time, if you had a conversation with him after that day?

A. He said when I saw him as to which way the horses come from.

Q. State the whole conversation.

A. He said the horses come in from the west of his house, west of the pasture lot. I told him I did not think they did. He said he could show me the tracks. We went and looked for them and found them.

Plaintiff also testified that the black colt was injured in the shoulders and is lame whenever it runs now; think it always will be. Never was lame before. The bay colt was hurt on the wire. Its legs swelled up, was hurt in two places, one of its legs was very sore. That the mare was cheap at \$200. That one of the colts before the injury was worth \$35. After the injury it was of no value. That the other colt was worth \$200 before the injury; after the injury, when cut on the legs, it was worth not to exceed \$175.

He also stated that on the Sunday when the horses were injured they were in the care of Charles Bell for the purpose of herding them with the cattle on the prairie, on

lands, part of which belonged to him, plaintiff, and upon part of which he had permission of the owner to herd. That Bell was in his employ, and that he did not know how the horses came to get away from the herd.

The following question was put to plaintiff by his attorney :

Q. Do you know what experience he has had as a herder and of taking care of horses and cattle in herds. If so, what kind of a person is he to take care of horses and cattle?

The question was objected to by counsel for the defendant, as immaterial, irrelevant, and incompetent. But the court overruled the objections, and the witness answered :

A. I considered him a very good herder.

On re-examination plaintiff stated that he afterwards measured the height of the fence near the place where the horses went over, and that it was about forty-one inches high.

L. D. Lesh was sworn and examined as a witness on the part of the plaintiff. He corroborated the testimony of the plaintiff in the main as to the condition of the dead mare, the condition of the corral, and the horse and dog tracks in the corral, and the statements of Mr. Cook on Monday morning. I quote from his testimony: "Cook said the horses came across the oats, through the oats and flax, and went right down the road to the house; while in the road the dogs took after them and they ran in the corral. He was trying to shut them up. They did not seem to see the fence but went right through it as though there was nothing there." This witness also agreed with Pickrel as to the value of the mare killed, and the damage to the colts.

D. P. Brown, a witness on the part of the plaintiff, corroborated the testimony of Bell, Pickrel, and Lesh in the main.

J. C. Campbell, a witness for the plaintiff, testified to a

conversation with Cook after the injury, in which Cook stated the facts substantially as he stated them to Pickrel in the presence of Lesh, Bell, and Brown, as testified to by them. Mr. and Mrs. C. F. Gunlack, witnesses for plaintiff, testified to seeing the horses going to and coming from Cook's place on the day in question. That when going towards Cook's the horses were trotting. They also saw them jumping over the fence from the corral and saw one or more of them fall. Mr. G. testified that the fence was about three and one-half feet high "and the wire about one foot." I understand him to mean that the boards were three and one-half feet high, and the wire about one foot above the boards. These witnesses testified also to a conversation with Cook, the evening of the injury, in regard to the horses and accident, in which Cook's statement was substantially the same as that hereinbefore stated. Neither of these witnesses saw or heard the dogs.

I. N. Inbody, sworn and examined as a witness for plaintiff, also substantially corroborated the testimony of Pickrel, Bell, Brown, and Lesh. He was a little more explicit than either of the other witnesses in stating the position of the mare as she lay with her neck broken, in reference to the corral fence. I quote:

Q. What distance did the mare lay from the fence?

A. Six or seven corn rows.

Q. From her head?

A. Yes, sir, from her head to the fence.

Mr. Tolbert, a witness for the plaintiff, testified that he remembers about the time Pickrel's mare was killed. That he was at home on that day from 10 o'clock "until about two hours by the sun." That he lives 100 or 120 rods from Cook's house, that he knows the direction of Cook's house from the house of witness. I quote from his testimony:

Q. State to the jury if you heard any noise in the direction of Mr. Cook's house on that day, and if so, state what it was.

A. Well, dogs a barking and people holloaing.

Q. Can you give the jury any idea how the holloaing was?

A. A good deal like—well, every person does not holler the same way if he wanted the dog to go. It was a good deal like everybody hollers when he wanted a dog to go. If I wanted a dog to run for something I say “sick him, sick him,” and I guess that is the way he hollered then a good deal.

Q. You know Mr. Cook’s voice?

A. Yes, sir; it was a good deal like his.

Q. Do you know any of his boys?

A. Yes, sir.

Q. State to the jury whose voice it was.

A. It was his. (This answer was stricken out by the court on motion of defendant’s counsel.)

Q. Whose voice was it?

A. I am positive it was Mr. Cook’s voice.

E. Farmer, a witness, testified only as to the value of of the horses, in which he fairly corroborates the other witnesses.

I. Inbody, a witness for plaintiff, testified that he had seen Mr. Cook’s dogs some four or five times as he passed there, before the accident, when the mare was killed. Counsel then asked him to state whether Mr. Cook had his dogs collared. This question was objected to as irrelevant, etc., but the court overruled the objection, and witness testified in several forms and with a fair degree of certainty that the dogs were not collared.

J. C. Campbell, witness for plaintiff, was recalled, and testified that he was well acquainted with Mr. Cook’s dogs, and that they were not collared.

C. F. Gunlack was recalled, and corroborated the testimony of the two last witnesses as to the dogs of Mr. Cook not being collared at about the time of the injury.

The foregoing is a fair *resume* of the evidence on the

part of the plaintiff. There was evidence nearly equal in volume to that of the plaintiff introduced in behalf of the defendant, but its consideration is neither necessary nor proper in the examination of the question as to whether the evidence is sufficient to sustain the verdict.

The evidence tends to prove, and it may be said, sufficiently proves, that on the day upon which the injury was sustained, the plaintiff was the owner of and had in his possession twenty-three or twenty-four head of stock horses, also a herd of fifty-one head of cattle. This stock was all being herded by Charles Bell, the hired man, or as is generally termed by courts and law writers, the servant, of the plaintiff. It was the duty of the plaintiff to keep this band of stock under his control, and upon such range as by ownership, or privilege granted by the owners thereof, either expressed or implied, he had the right to pasture. This duty on the day in question he did not perform, but on the contrary the band of horses was allowed to become separated from the cattle, and pass from the control or knowledge of the herder, and to go upon the premises of the defendant, and while so out from under the control of the plaintiff or his servant, and on the premises of the defendant, certain of them were killed and others injured. From certain testimony offered by the plaintiff and admitted over the objection of the defendant, it would seem to be his theory, and possibly that of the court which tried the cause below, that when plaintiff had placed the stock in the care of a servant whom he believed, and had reason to believe, was faithful, and competent as a herder of stock, that he had discharged his whole duty, and was not responsible for any neglect of duty on the part of such servant. It is not deemed necessary to more than state the proposition, nor to cite authorities, to show that such is not the law. The books are full of cases where railroad companies, cities, and other employers, are held responsible for the negligence of their employees,

and I know of no case holding that a belief, or confidence, on the part of the master, is a defense to him for the consequences of the negligent act of the servant. In such cases, the negligence of the servant is the negligence of the master.

Did the negligence of plaintiff's servant, through which the band of horses escaped from his control and knowledge, and went upon the premises of Cook, contribute to the loss of the mare and the injury of the colts? That it did, I think, cannot be seriously questioned. The direct and immediate cause of the injury was the horses jumping over a board fence with a wire on top, about a foot from the top board. This fence and wire was quite harmless to the horses as long as they kept away from it. They would have kept away from it as long as they remained under the eye and control of the herder. The herder's care and control stood between the horses and this danger. The negligent withdrawal of such care and control led directly, though not necessarily, to the injury and loss. Let us suppose that these horses, instead of going upon the premises of the defendant, when the plaintiff's servant negligently allowed them to escape from his control and knowledge, had gone upon the neighboring railroad track and been there killed, or damaged, by a passing train. The railroad company would have been liable for their value, it is true, but solely for the reason that such company had neglected to fence its track, as required by law. Now there is no law requiring farmers to fence their fields, nor to keep their corrals closed. So that if it be granted, for the purpose of this argument, that the fright to the horses, caused by the running and barking of the defendant's dogs, was the immediate cause or occasion of the accident to the horses, yet it is undeniable that their being at large without the control of the herder directly contributed to it.

Our statutes, § 16, chap. 4, Comp. Stat., provides,

"That the owner or owners of a dog or dogs shall be liable in an action for all damages that may accrue to any person or persons by reason of such dog or dogs killing, wounding, worrying, or chasing any sheep or other domestic animal belonging to such other person or persons," etc.

The evidence does not tend to prove that the death or injury of these horses was attributable directly to the "killing, wounding, worrying, or chasing of dogs." It does tend to prove that the chasing of the horses by dogs contributed to the injury. Notwithstanding the statute above quoted, whatever liability or fault may be held to attach to the owner of dogs contributing to the injury of stock, is in the nature of negligence in allowing his dogs to escape from his control and do the act complained of, for if the dog is under the control of its owner when doing the act, it is then the act of the owner and not of the dog. It then amounts to about this: Pickrel was negligent, through his servant, in allowing his band of horses to escape from his control and go upon the premises of Cook. Cook, under the provisions of the statute, was negligent in keeping dogs. I quote the following from Shearnian and Redfield on Negligence, § 25, as the law applicable to this case: "One who is injured by the mere negligence of another, cannot recover, at law or in equity, any compensation for his injury, if he by his own or his agent's ordinary negligence or willful wrong proximately contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault the injury would not have happened him, except where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him."

There is no evidence in the case which tends to prove that, after Cook became aware that by reason of the neg-

Wilson v. Beardsley.

ligence of Pickrel in allowing his horses to escape, and his own statutory negligence in keeping dogs on his premises, there was danger of the horses being injured, he omitted to use a proper degree of care to avoid injury to the horses. But on the contrary, while from the evidence or in the nature of things it utterly fails to appear that Cook ever became aware of the danger to the horses until after the injury, yet the evidence tends to prove that he used his best endeavors to secure the horses.

At the consultation we were all of the opinion, that for the reasons which I have thus endeavored to present, the verdict is not sustained by sufficient evidence, and that having on that point reached the conclusion that there must be a new trial, the other points would not be considered. I will, however, add that we were equally agreed that the question as to whether the defendant's dogs were collared at the time of the accident to plaintiff's horses did not properly arise in the case.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

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| 90 | 449 |
| 95 | 138 |

WILLIAM A. WILSON ET AL., PLAINTIFF IN ERROR, v.
MILLS H. BEARDSLEY, DEFENDANT IN ERROR.

Principal and Agent: DRAFT ON AGENT BY PRINCIPAL. The plaintiffs, who were engaged in business in the city of O., in this state, wrote a letter to one N., their salesman at Ogden, Utah, authorizing him to draw on them for \$75. He placed a figure 1 before the figures 75, whereby the latter was changed to show authority to draw for \$175.00. The letter as changed he showed

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to one B., the hotel-keeper with whom he was stopping, and thereby induced him to indorse a draft on the plaintiffs for \$150. The draft having been protested for non-acceptance, and paid by the indorsee, *Held*, That he could recover against the plaintiff to the extent of the authority of their salesman to draw on them.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

C. J. Greene, for plaintiffs in error.

A. C. Troup, for defendant in error.

MAXWELL, CH. J.

The facts in the above case are substantially as follows:

Wilson & Larison, the plaintiffs in error, were, at the time referred to herein, and are now, importers and jobbers of teas, cigars, and spices, having their principal place of business at Omaha, Nebraska. During the times aforesaid they had in their employ a traveling salesman named A. P. Nichols. Under their contract of hire with him they were to pay him a salary of \$75 per month, and commissions upon all sales, and he was to pay his own expenses. On the 5th of January, 1883, Wilson & Larison wrote a letter to Nichols, at Ogden, Utah, telling him, among other things, that he might draw on them for \$75. This letter Nichols received, and altered, by prefixing the figure 1 to 75, so that it read \$175. The change was skillfully made, and well calculated to deceive. The testimony shows that Nichols at this time was a guest of defendant in error; that Nichols desired to draw on plaintiff in error for \$150; that it was made to appear that an indorser to the draft about to be drawn was necessary; that defendant in error was requested by Nichols to indorse said draft, and as an inducement to do so exhibited to him and the bank cashier the letter of plaintiffs in error, altered as

aforesaid, apparently authorizing him to draw on them for \$175; that on the faith and credit of that letter defendant in error did indorse said draft; that in due course of business said draft was presented to plaintiffs in error at Omaha for payment, and payment by them was refused, on the ground of "no funds"; that said draft was thereupon duly protested and returned unpaid to the bank at Ogden, where defendant in error was required to pay, and did pay, the full amount of the draft, with protest fees, amounting in all to \$152.25.

On the trial of the cause in the court below judgment was rendered for \$75 in favor of Beardsley, from which the plaintiffs herein bring the cause into this court by petition in error.

No case has been cited exactly in point by either party, and we are compelled to adopt such a rule as will as far as possible do justice between the parties.

The rule is well settled that a principal will be bound by the acts of his agent within the scope of his apparent authority. *St. L. & M. P. Co. v. Parker*, 59 Ill., 23. *Fatman v. Leet*, 41 Ind., 133. *Kerslake v. Schoomaker*, 3 N. Y., 524. *Tucker v. Woolsey*, 64 Barb., 142. *Phila., etc., R. R Co. v. Weaver*, 34 Md., 431. *Bronson v. Chappell*, 12 Wall., 681. *Golding v. Merchant*, 43 Ala., 705.

The plaintiffs must have intended that their letter above referred to should be used as a letter of credit to enable Nichols to obtain the \$75 upon the draft which he was authorized to draw on them. To this extent he was acting within the scope of his authority, and his acts were valid. The draft, therefore, was unauthorized only as to the excess over \$75. Nichols was the plaintiffs' agent, and so held out by them, to some extent at least, as being trustworthy.

This fact, while it would not make them liable for any material alteration in the letter made by such salesman, is yet a circumstance tending to show that he had some claim

upon them, and thereby, no doubt, led to less careful inquiry in regard to the extent of the agent's authority than otherwise would have been had. The letter was in the nature of a power of attorney, by which the principals agreed to ratify the act of the agent to a certain extent, authorizing him to draw in his own name upon them for a certain amount. Now suppose that the agent had changed this so as to show authority in him to draw two drafts on the plaintiffs, each for \$75, could they plead as a defense to the first draft that it was unauthorized, and that therefore an innocent indorser relying upon their letter should be defrauded? We think not. The authority would be wanting only as to the second draft. The same rule is applicable here, there being an actual authority to draw to the extent of \$75. The judgment of the court below is clearly right, and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

STATE OF NEBRASKA, EX REL. D. B. PERRY, v. CLAY COUNTY.

1. Internal Improvements: BONDS FOR WATER GRIST-MILL.

Where bonds were issued by a precinct to be delivered to certain persons named, upon their executing a satisfactory bond, with approved sureties, to the county commissioners, "conditioned for the erection of a grist-mill on the Little Blue river, east of Spring Ranch, in said precinct; said grist-mill to be first-class in all respects, with capacity for two run of stone, if trade demands," *Held*, After the issue of the bonds and erection of mill, where no question is made in the pleadings that the mill is not propelled by water, that it will be presumed from the words, "on the Little Blue river."

2. ———: ———. Bonds issued pursuant to law for a grist-mill propelled by water are valid.

ORIGINAL application for mandamus.

Marquett, Deweese & Hall, for relator.

Dilworth & Smith, Ryan Bros., and *L. G. Hurd*, for respondent.

MAXWELL, CH. J.

This is an application for a peremptory writ of mandamus against the county board of Clay county to compel the levying of a tax on Little Blue precinct, in said county, to pay ten bonds for five hundred dollars each, with interest coupons attached. Said bonds were issued in pursuance of an election held in said precinct upon this proposition:

“ Notice is hereby given that by authority in us vested, we, the county commissioners within and for the county of Clay, the state of Nebraska, do hereby issue this proclamation for a special election to be holden in and for the Little Blue precinct in the county of Clay and state of Nebraska, on the 19th day of August A. D., 1873, at the house of Cyrus Griffith, in said precinct, to vote upon the following proposition: Shall the county commissioners and state of Nebraska issue the bonds of Little Blue precinct to the amount of seven thousand dollars, payable to Peck and Mestin or bearer on the expiration of eight years from date, and bearing interest at the rate of ten per cent per annum annually, with coupons attached to said bonds, payable to bearer at the office of the county treasurer of Clay county? And shall the county commissioners cause to be levied annually upon the taxable property of said precinct, in addition to the usual taxes, an amount of taxes sufficient to pay the annual interest on said bonds until and including the year 1880, and for the year 1881, an amount sufficient to pay all interest and principal remaining unpaid? Said

bonds to be immediately issued and delivered to said Peck and Mestin, whereupon Peck and Mestin shall give their obligation, amply secured to the amount of seven thousand dollars seven years after date, with interest payable annually at the rate of six per cent per annum, said obligation to be held in trust by the county treasurer of said county of Clay, and the proceeds to be applied to payment of said bonds and interest. And further, provided the said Peck and Mestin bind themselves with good and sufficient security, to be approved by the county commissioners of said county of Clay, conditioned for the erection of a grist-mill on the Little Blue river, east of Spring Ranch and in said precinct, said grist-mill to be first-class in all respects, with capacity for two run of stone if trade demands. Furthermore, said Peck and Mestin shall obligate themselves to do custom work to the capacity of the mill when required. Said mill to be 28 by 40 feet, two stories high above the basement, to cost from seven thousand to twelve thousand dollars, said mill to be in running order on or before the first day of March, 1874. The above proposition will be voted upon by ballot at the time and place aforesaid in the following form: 'Shall the precinct bonds of Little Blue precinct be issued to Peck and Mestin in pursuance of the proposition submitted by the commissioners? "Yes."'

" 'Shall the precinct bonds of Little Blue precinct be issued to Peck and Mestin in pursuance of the proposition submitted by the commissioners? "No.' "

" Those voting for the proposition will vote 'yes' votes. Those voting against the proposition will vote 'no' votes.

" Done at Sutton, in Clay county, in state of Nebraska, and by order of the county commissioners, this 15th day of July, A. D. 1873.

[SEAL.]

" F. M. BROWN,
" County Clerk."

The proposition was adopted and the bonds issued.

The principal objection urged against the validity of these

Gillespie v. Smith.

bonds is that it does not appear that the bonds in question were issued for a water grist-mill. It will be observed that the bond which Peck and Mestin were required to give was "conditioned for the erection of a grist-mill on the Little Blue river, east of Spring Ranch in said precinct." The testimony also shows that the mill was erected as agreed upon, and there is no claim in the pleadings that it is not propelled by water. The case clearly falls within that of *Traver v. Merrick County*, 14 Neb., 327. We adhere to that decision and it is decisive of this. A peremptory writ will issue as prayed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

LUELLA GILLESPIE, PLAINTIFF IN ERROR, V. MRS. H.
C. SMITH, DEFENDANT IN ERROR.

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| 20 | 455 |
| 53 | 579 |
| 53 | 592 |
| 20 | 455 |
| 57 | 760 |

Husband and Wife: SEPARATE ESTATE OF WIFE: LIABILITY OF WIFE. Where a married woman signed a note for a stranger as surety, and thereby enabled him to borrow money, and in an action on the notes alleged in substance that she signed the same only as surety, and "that she received no part of the consideration for which said notes were given, and no benefit accrued from said notes to her or her separate estate," *Held*, That as her non-liability can arise only from her inability to enter into the contract, she must show by her answer that the contract did not concern her separate property, trade, or business.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

J. L. Caldwell, for plaintiff in error, cited: *Hale v. Christy*, 8 Neb., 264. *Savings Bank v. Scott*, 10 Id., 83. *Barnum v. Young*, 10 Id., 309.

Lamb, Ricketts & Wilson, for defendant in error, cited: *Davis v. Bank*, 5 Neb., 242.

MAXWELL, CH. J.

This action was brought upon two promissory notes signed by Sarah Cooper and Mrs. H. C. Smith.

The answer by Mrs. H. C. Smith is, "that she is and was at execution of notes, a married woman and wife of Henry C. Smith, and lived with him as his wife. That she executed said notes as surety, and that she had no interest in the transaction, nor did the consideration thereof accrue to her separate estate, and neither were given in relation thereto. That she received no part of the consideration for which said notes were given, and no benefit accrued from said notes to her or her separate estate. That she neither contracted nor intended to make said notes a charge on her separate estate."

The plaintiff, in reply to the separate answer, says she admits defendant is a married woman, and the plaintiff says she (also) is a married woman and earned most of said money with her own hands. That she knew the defendant Smith for many years. That said defendant, though having her husband living with her, for many years has, in Lancaster county, state of Nebraska, owned in her own name, and conducted, directed, and controlled business, and bought, sold, owned, bargained for, and disposed of property independent of her said husband; and relying on her personal ability to pay and be responsible for the payment of said sums of money, the plaintiff parted with and delivered to the defendant Cooper said sums of money, mostly the proceeds of her own toil. That it was relying upon the personal estate of said defendant being charged with the payment of said sums. That was the sole inducement for making the loan.

A demurrer to the reply was sustained in the court below, and the action as to Mrs. Smith dismissed.

McMurtry v. Edgerly.

Sec. 4 of Chap. 53 of Compiled Statutes, in relation to married women, provides that "any married woman may carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name."

It will be observed that Mrs. Smith in her answer limits her defense to the allegation that the notes are not a charge on her separate estate. While the word "estate" in its full sense may perhaps include "trade or business," yet when a married woman sets up her coverture to avoid liability on her contracts she must in her answer negative all the causes from which otherwise her liability may be inferred, as that "the contract did not concern her separate property, trade, or business." The reason is, that her non-liability can only arise from her inability to contract, and this she must clearly allege. The answer, therefore, does not constitute a defense to the plaintiff's cause of action, and the court erred in dismissing the action.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

J. H. McMURTRY, APPELLEE, v. ASA S. EDGERLY, APPELLANT, AND JOHN S. GREGORY, APPELLEE.

Bankruptcy: DISCHARGE: FRAUD: INJUNCTION. One M. brought an action in equity to enjoin a sale upon execution of real estate owned by him, upon the ground that since the recovery of the judgment he had been discharged from the debt by proceedings in bankruptcy. To this petition the defendant answered in

substance that while said proceedings in bankruptcy were pending the plaintiff was the owner of the real estate in controversy in the name of another, and that he fraudulently failed to list the same as a part of his assets. *Held*, That the court as a condition of granting relief should apply the maxim "he who seeks equity must do equity," and that relief may be denied except upon condition of paying the debt.

APPEAL from the district court of Lancaster county.
Heard below before HAYWARD, J.

Ryan Bros., for appellant Edgerly.

J. R. Webster, for appellee McMurtry.

J. S. Gregory, for appellee Gregory.

MAXWELL, CH. J.

In June, 1884 the plaintiff filed a petition in the office of the clerk of the district court of Lancaster county substantially as follows:

"1. Plaintiff alleged the rendition in said district court of a judgment in favor of Edgerly against J. H. McMurtry, John S. Gregory, and J. M. Young, on October 10, 1876, for \$605.75.

"2. That on August 2d, 1878, the plaintiff was, by the consideration of the district court of the United States in and for the district of Nebraska, wherein the plaintiff then resided, duly adjudged and declared to be a bankrupt, and in said proceeding of bankruptcy the said indebtedness due said Edgerly was by this plaintiff duly reported and scheduled, and said Edgerly duly filed and made proof of his said claim, and afterwards this plaintiff was, in consideration of said court on the 15th of March, 1879, duly and legally adjudged to be and was discharged and absolved of and from all liability to his creditors of date prior to the filing in said court of his petition in bankruptcy, and prior to August 2d, 1878, including his said liability to

said Edgerly for or on account of indebtedness subsisting or accruing before said 2d day of August, 1878, the date of such adjudication in bankruptcy.

"3. The indebtedness upon which said judgment was recovered was a simple contract obligation, and not for moneys received in an official or fiduciary capacity or as trustee, or yet for any class or character of indebtedness created by fraud or embezzlement or defalcation as public officer, by the plaintiff, or yet while he was acting in any fiduciary character, nor was said debt in any way within any class of indebtedness excepted from the operation of the acts of congress relating to bankruptcy and the discharge of insolvent debts, under the acts and proceedings in bankruptcy, from further liability as debtors upon compliance with the acts aforesaid, and under proceedings thereunder had and taken; and the plaintiff herein, by reason of the provisions of the law of bankruptcy and the proceedings aforesaid thereunder in said court duly had, and adjudication of discharge aforesaid, is entitled to be discharged of liability upon the defendant Edgerly's said judgment and is discharged therefrom; yet said Edgerly, though well knowing the facts aforesaid, claims and pretends that this plaintiff is not discharged of liability; and lately on May 18, 1882, said Edgerly caused to be issued out of this court a writ of execution and placed the same in the hands of the sheriff of Lancaster county, Nebraska, and directed said sheriff to levy upon the lands and goods of this plaintiff for the satisfaction of said judgment, and said sheriff at the commencement of the action was threatening to levy and was about to levy said execution on the property of the plaintiff, and unless enjoined the sheriff will so levy the same on the property of the plaintiff, and plaintiff avers that said judgment is satisfied and discharged as against the plaintiff, and that said execution ought not to have been issued against the plaintiff, and should be by the court recalled and annulled so far as the same affects the

plaintiff; and plaintiff says the plaintiff is the owner of a large amount of personal property, and also owns real estate in said county of Lancaster, among which is lot 2 in block 39, and lot 12 in Young's East Lincoln addition, which are of value to the plaintiff; but said judgment so set up and asserted by the defendant, Asa S. Edgerly, is a cloud on the plaintiff's title to his said lands, and the value thereof is thereby much impaired, and plaintiff is by the assertion and claim of said judgment barred to enjoy the title to the same, or his proprietorship in said lands, or to sell the same as freely as by law is his right.

"4. Plaintiff further says the defendant, Asa S. Edgerly, ought not further to be permitted to set up or insist on said judgment, or to assert the same against plaintiff, because after the commencement of this action, about November 16, 1885, this plaintiff and said Edgerly had an accord and satisfaction of their mutual demands growing out of said judgment proceedings in bankruptcy and this action, and plaintiff exhibited to said Edgerly the said discharge in bankruptcy, it was by said Edgerly proposed to this plaintiff that if this plaintiff would pay the costs of this suit to that time accrued, the said Edgerly would no further prosecute the defense of this action, but would consent that said judgment should be decreed discharged as to this plaintiff and the preliminary injunction herein issued be made perpetual, to which proposed accord the plaintiff agreed and said stipulation was thereupon, on November 17, 1882, reduced to writing and signed and filed in said cause and was and is as follows, viz :

" It is hereby stipulated by and between the said plaintiff, James H. McMurtry, and the defendant, Asa S. Edgerly, that the said plaintiff did obtain discharge in bankruptcy as alleged; that the injunction be made perpetual as prayed in said petition, and said judgment adjudged to be released and discharged as to said McMurtry, and to be no lien upon his property. Complete record is by parties

to this stipulation waived. Plaintiff waives right to recover or have taxed his costs herein. Above stipulation and judgment to be without prejudice to the rights of Asa S. Edgerly against said defendant Gregory, or others interested with him, and cause to proceed on cross-petition of said Gregory.

“J. R. WEBSTER, FOR McMURTRY,

“BROWN & RYAN BROS., FOR A. S. EDGERLY.

“And thereupon, and on November 16, 1882, it was by the court considered, ordered, and adjudged, and decreed as follows:

“‘That the judgment rendered against said James H. McMurtry *et al.*, in favor of said Edgerly, be and the same is hereby annulled, discharged, and satisfied of record so far as the plaintiff herein is affected thereby, and is further adjudged not to be a lien on real estate mentioned in petition, or yet on any real estate of the plaintiff herein, and that said defendant, Asa S. Edgerly, be and is hereby enjoined and restrained from at any time hereafter claiming or averring that this plaintiff is liable on said judgment and from ordering execution thereon to be issued against the plaintiff, and from in any way attempting to enforce said judgment, and that said McMurtry pay all costs herein expended, taxed at \$8.25, and cause to proceed on cross-petition of said Gregory, as per stipulation herein filed and entered,’ which said judgment appears of record at page 188, of Journal I. of this court in this cause, and plaintiff says that no proceedings of appeal or error ever have been taken from said judgment to the supreme court at any time, nor has notice of appeal or summons in error at any time been issued from the supreme court in said case against the plaintiff, or been served on him, nor has any exception or objection been taken to said judgment by any of the parties thereto, but the same has ever since been abided by by all the parties thereto, and plaintiff did, by stipulation and judgment on his part, abide, and he paid the costs of this court

aforesaid, \$8.25, no part of which at any time has ever been repaid or tendered to be repaid by any one at any time to this plaintiff.

"And plaintiff shows that afterwards said cause proceeded between said Gregory and said Edgerly as adversary parties, and such proceedings were had that afterwards, on November 22d, 1883, a judgment was by this court rendered in said cause in favor of said Edgerly against said Gregory; that said Gregory was not discharged from his liability on said judgment, from which said Gregory afterwards appealed to the supreme court from the judgment so pronounced by this court November 22d, 1883, on the cross-issue made between himself and said Edgerly; and such proceedings were in such appeal had that afterward, and on the day of, 188..., the supreme court set aside and annulled said judgment, but plaintiff shows that no notice of error or appeal was served on him in said appellate proceedings, nor did he appear in the same nor submit his rights to the supreme court for review, but that the plaintiff now pretends that the supreme court set aside and annulled said judgment November 16, 1882, and claims that said judgment is annulled and set aside, and by motion induced this district court, on June 8d, 1885, to set aside, vacate, and annul the same, without notice of any kind to the plaintiff; but plaintiff avers that said judgment of November 16, 1882, is in full force and virtue, and that neither the supreme court nor this court had any jurisdiction to set aside said judgment, and that the supreme court did not assume to set aside the same, and that the order of the court assuming so to do was without jurisdiction, and was of no effect, and void.

"Wherefore plaintiff prays the court that said judgment rendered in favor of said Edgerly, the 10th of October, 1876, in this court, may be annulled, discharged, and satisfied of record so far as the plaintiff is affected thereby, and be adjudged not to be a lien on said real estate, or yet on any real estate of the plaintiff.

"2. That the order of this court of June 3d, 1885, assuming to vacate and annul plaintiff's judgment of November 16th, 1882, may be annulled and vacated and set aside, and plaintiff's said judgment held to be void.

"3. That said defendant Asa S. Edgerly may be enjoined and restrained from at any time hereafter claiming or averring that the plaintiff is liable on said judgment, and from ordering execution thereon to be issued against this defendant, and from in any way attempting to enforce said judgment pending this suit.

"4. That defendant may be enjoined from asserting said judgment of November 16th, 1882, to have been vacated, or that said order of June 3d, 1885, to be valid, or of any force or virtue whatever.

"5. For such other or different relief as the plaintiff ought in equity to have, and for costs."

The defendant Edgerly, in his answer, as a third defense, "denies that McMurtry was entitled to his discharge in bankruptcy, and denies that a discharge in bankruptcy was ever by him obtained which operated as a release of the judgment, in favor of the defendant against the plaintiff and the other parties herein, or any of them; and for want of information sufficient to form a belief, defendant denies every other allegation in paragraph two.

"Fourth Defense. Defendant admits that the debt of the other parties herein to this defendant (whereon judgment was rendered) was founded upon a simple contract, and said judgment was simply for the amount due by the terms of said contract by reason of the failure of the obligors to pay a debt as they had agreed to do. Said debt was not created in a trust, fiduciary, or official relation, neither by fraud or by embezzlement in an official or other capacity. Defendant denies every other allegation in paragraph three of plaintiff's amended petition, except that the judgment in favor of this defendant against McMurtry is a lien on the real property, which this defendant

admits, and asserts that said judgment should be satisfied out of the lands and goods of the plaintiff herein.

"Fifth Defense. Defendant denies each allegation of paragraph four of plaintiff's amended petition. Denies that this defendant was party to or cognizant of such an agreement as is set out in paragraph four of plaintiff's amended petition, and avers that if such an agreement was entered into it was without the knowledge or assent of this defendant, and this defendant therefore repudiates the same; that it was without consideration; that McMurtry has never paid this defendant anything thereon, nor suffered anything in consequence thereof. The stipulation was unauthorized, and therefore void as to the defendant.

"Sixth Defense. Defendant avers that during the alleged pendency of the bankrupt proceedings, which plaintiff alleges resulted in the discharge of plaintiff, the plaintiff was fraudulently concealing property in the name of Henry E. Wells, a near relative of said plaintiff. That plaintiff originated and carried through said bankrupt proceedings fraudently and with the intention of defrauding his creditors, among whom was this defendant. That said plaintiff scheduled among his assets no property subject to execution, but during the whole proceedings instituted and carried on by plaintiff for his discharge, a large amount of real property was held in trust for plaintiff by Henry E. Wells aforesaid, and other parties to this defendant unknown. That plaintiff herein was an equitable owner of said property, and procured the legal title to be vested in trust for him as aforesaid, and in fraud of the rights of this defendant withheld said property from the list of his assets, and from being applied to the payment of his debts, and from administration upon as a part of his estate in bankruptcy. This defendant alleges that the value of the property so held for the benefit of said plaintiff herein far exceeded the amount of the judgment of this defendant against said plaintiff herein, and that by reason of the false

statements and fraudulent practice in the proceedings in bankruptcy, plaintiff's alleged discharge in bankruptcy is not valid as against the judgment in favor of this defendant against plaintiff.

"Seventh Defense. This defendant, further answering, says this court has no jurisdiction to enforce the orders in bankruptcy or otherwise of the courts of the United States, and that a state of facts properly cognizable in a court of equity is not disclosed in the plaintiff's petition."

The plaintiff demurred separately to the 4th, 5th, 6th and 7th defenses, upon the ground that the facts stated therein were not sufficient to constitute a defense. The demurrer was sustained to the 6th and 7th defenses, and on the trial of the cause the court found the issues in favor of the plaintiff, and rendered a decree accordingly.

It will be observed that the allegations of the sixth count are, in substance, that the plaintiff was the owner of the property levied upon in this case during all the time that the proceedings in bankruptcy were pending, but that he did not list the same as a part of his assets. There are charges of fraudulent intent which need not be referred to here.

The plaintiff comes into a court of equity asking that the defendant, among other things, be enjoined from selling the real estate in question to pay a judgment recovered before the proceedings in bankruptcy were instituted, the plaintiff, if the allegations of the answer are true, being the owner of all of said real estate during the time such proceedings were pending. If this is true, the familiar maxim of equity will apply that he who seeks equity must do equity. This rule has been frequently applied in cases of usury which had rendered the contract void, yet a party seeking discovery or relief therefrom could obtain the relief only upon the terms of paying the lender the sum actually loaned with lawful interest. *Post v. Bank*, 7 Hill, 391. *Rogers v. Rathbun*, 1 Johns. Ch., 367. *Tup-*

McMurtry v. Edgerly.

per v. Powell, Id., 439. *Fanning v. Dunham*, 5 Id., 142, *Livingston v. Harris*, 3 Paige, 533, 11 Wend., 329. *Vilas v. Jones*, 1 Comst., 278. *Legoux v. Wante*, 3 Har. & John, 184.

In *Rogers v. Rathbone*, 1 John. Ch., 367, Chancellor Kent says: "The bill prays for a discovery of the usury charged, and consequently to subject the defendant to a forfeiture at law of his whole debt; and as the bill does not contain an offer or tender of the sum actually borrowed, with the lawful interest, after crediting the eleven per cent already advanced, the motion cannot be granted. It is a settled principle, that he who seeks equity must do equity; and if the borrower comes into this court for relief against his usurious contract, he must do what is right as between the parties, by bringing into court the money actually advanced, with the legal interest, and then the court will lend him its aid as against the usurious excess." In the usury cases referred to, the contract was void at law, yet the courts of equity refused to grant relief except upon condition that the party seeking relief should do justice by paying what was equitably due. So in this case, the plaintiff seeks relief upon strictly legal grounds, yet the court, as a condition of granting such relief, may require him to do justice by the application of property held by him, but not listed in the bankruptcy proceedings to the payment of the debt. The 6th count of the answer, therefore, does state a defense to the petition.

The judgment of the district court is reversed, and the cause remanded to the court below for further proceedings. No reference need be made to the seventh count, as the jurisdiction of the court is undoubted.

REVERSED AND REMANDED.

THE other judges concur.

STATE, EX REL. B. CONWAY, PLAINTIFF, v. LOUIS C. WEBER ET AL., THE BOARD OF TRUSTEES OF THE VILLAGE OF ARLINGTON, AND LENA KLINDT AND LENA STALTENBERG, DEFENDANTS.

1. **LIQUORS: LICENSE: PETITION.** The presentation to the board of trustees of an incorporated village, or filing in the office of the village clerk, of a petition, signed by not less than thirty of the resident freeholders of such village, applying for a license to the person or persons therein named to sell malt, spirituous, and vinous liquors in said village, is an indispensable condition precedent to the issuance of such license.
2. **REMONSTRANCE: HEARING: NOTICE.** When, after the presentation or filing of a petition for such license, an objection, protest, or remonstrance against the issuance of such license alleging that two of the thirty-two persons signing said petition are the identical persons named in the body of said petition as the persons to be licensed, that other two signers, naming them, are not lawful residents of said village, and that other two signers also, naming them, are not lawful freeholders in said village, was presented to and brought to the consideration of said board, it was the duty of such board to appoint a day for the hearing of the case. And the day so appointed should have been fixed, sufficiently advanced in the future as to give a reasonable opportunity to subpoena witnesses and make suitable preparation for trial.
3. **ADJOURNMENT.** When such board, at 10 o'clock P.M., adjourned to 9 o'clock A.M. the next day for a hearing of the remonstrators, such time was not a reasonable one, and it was a substantial denial of a hearing to the remonstrators.

ORIGINAL application for mandamus.

H. C. and A. M. Bittenbender, for relator.

N. H. Bell, for respondents.

COBB, J.

This is an original application to this court for a peremptory mandamus against the village board of the village

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of Arlington, in the county of Washington, commanding them to appoint a day for the hearing of the case arising on the remonstrance against the said board granting a license to Lena Klindt and Lena Staltenberg to sell malt, spirituous, and vinous liquors in said village, etc.

After the necessary formal allegations, it is set forth in the said application that on the 22d day of April, 1886, there was filed in the office of the clerk of said village an application by petition of thirty-two persons claiming to be resident freeholders of said village, asking that license be granted to Lena Klindt and Lena Staltenberg under the firm name of Klindt & Staltenberg, to sell malt, spirituous, and vinous liquors within said village, as provided by law.

That a notice of said application was published in a newspaper published in the said county of Washington on the 22d and 29th days of said month of April respectively, etc.

That on the 30th day of April, 1886, a remonstrance in writing was filed in the office of the village clerk of said village, signed by the plaintiff and six other residents of said village, remonstrating against granting license to said Lena Klindt and Lena Staltenberg as asked for by said application, and requesting said board of trustees to appoint a day for the hearing of said case.

That the attention of said board was called to said remonstrance at the meeting of said board held for the purpose of considering the said application for license on the 30th day of April, 1886, but that instead of appointing a day for the hearing of said remonstrance so that said remonstrators might have a fair opportunity to be present with their witnesses, the said board, at 10 o'clock P.M., of said day, adjourned until 9 o'clock the following morning.

That none of said remonstrators were present at the time of said adjournment, nor notified of said adjourned meeting.

That plaintiff, having heard through rumor of the said

adjourned meeting, appeared thereat, and then and there asked for a continuance of said hearing until the 5th day of May of the said instant in order to have time to procure evidence to show that less than thirty of the signers of the said application were resident freeholders, which request of the plaintiff was refused, and the said board then and there proceeded to and did vote to license and did license the said Lena Klindt and Lena Staltenberg to sell intoxicating liquors from the first Tuesday in May, etc.

That there has been no hearing on said remonstrance, nor any other time fixed for such hearing, etc.

The defendants, being duly notified by the plaintiff of his intention to apply for a mandamus, appeared in this court on the last day of the last term and contested the application by argument, but filed no written answer. The matter was then taken under advisement. The facts alleged in the petition are sufficiently proved by certificates of the proceedings of the village board under the hand and seal of the village clerk. The statute, section 3, chapter 50, p. 414, Comp. Stats., is as follows :

“SEC. 3. If there be any objection, protest, or remonstrance filed in the office where the application is made, against the issuance of said license, the county (city or village) board shall appoint a day for hearing of said case, and if it shall be satisfactory proven that the applicant for license has been guilty of the violation of any of the provisions of this act within the space of one year, or if any former license shall have been revoked for any misdemeanor against the laws of this state, then the board shall refuse to issue such license.”

Section 4 provides as follows :

“SEC. 4. On the hearing of any case arising under the provisions of the last two sections, any party interested shall have process to compel the attendance of witnesses, who shall have the same compensation as now provided by law in the district court, to be paid by the party calling said witnesses,” etc.

There are two questions to be considered for the determination of this case.

1. Do the facts above stated bring the case within the meaning and intent of the provisions of the sections above quoted? It is true that the allegations of the protest as set out in the petition are directed against the procedure of the applicants for license, and not against the applicants themselves on account of any violation of the statute for having forfeited any previously granted license, or other misconduct. The first section of the act which we have under consideration limits the power of the board to grant license to cases where they have been petitioned to grant such license by not less than thirty of the resident freeholders of the town, city, village or precinct, as the case may be. The presentation to the board of a petition complying in all respects with the said provision is necessary to give the board jurisdiction and power to act. There was a petition before the board which on its face complied with such provision. In the absence of objection made within the time limited by other provisions of the same section, it would probably be sufficient; but within the time so limited, a remonstrance was presented to the board alleging that two of the signers of said petition, designating them by name, were not lawful residents of said village, and that two other signers of said petition, also designating them by name, were not lawful freeholders of said village. Also, that two of the signers of the said petition were the identical Lena Klindt and Lena Staltenberg named in the body of said petition as the persons to be licensed. There are thirty-two names in all to the said petition, so that if either two of the above grounds or causes of protest are true, then it is not a legal petition for the purpose intended, and the board is without jurisdiction to grant the license applied for. Whether either two, or even one, of them are true, are questions of fact, to be tried and determined upon evidence. The case is therefore one within the meaning and

intent of the law requiring a trial and the ascertainment and settling of matters of fact by the board before it could properly act on the application.

2. Did the board "appoint a day for the hearing of said case" within the true meaning and intent of the statute? It would seem that the board conceded, in some degree, the right of the remonstrators to have some time in which to present the grounds of their remonstrance. In the language of their minutes of April 30, they "adjourned to Saturday, May 1, at 9 o'clock A.M., for a hearing of the remonstrance and other business." But according to the allegation of the petition, this adjournment took place at the hour of 10 P.M. When we consider the object and purpose of the statute, we cannot deem this adjournment at bed-time until the earliest business hour of the next day, as the appointing of a day for the hearing of said case, or as a fair and intelligent administration of the law by the board.

Ordinarily, in order to try a question of fact, witnesses must be subpoenaed and other preparations made. In order to do this, a definite day and hour must be fixed for such trial, and that sufficiently advanced in the future to enable the witnesses not only to travel from their homes to the place of trial, but to make some preparation for an absence from their homes and avocations. In criminal cases courts may require and enforce the immediate attendance of witnesses because of the interest of the state, and the peace and order of society on the one hand, and the life or liberty of the citizen on the other, being at stake; but in proceedings where the pecuniary interests of litigating citizens only are involved, reasonable notice to witnesses as well as citizens should always be given. The time given in the case at bar was not sufficient, and the course pursued by the village board amounted to a denial of the right of the remonstrators to a hearing.

I pass over the point presented in the remonstrance that

certain members of the village board were signers of the petition for license and that some of them would have to be counted as such signers, even did no objection exist to any of the other signers in order to make out the necessary number as required by law. The board could, doubtless, take judicial notice of the facts necessary to a decision of that question. But I will quote the language of this court by Judge REESE upon a similar question which arose in the case of *Vanderlip v. Derby*, 19 Neb., 165. "It is shown that two of the board opposed the issuance of the license until a proper examination could be made, and voted against its allowance; three voted in favor of the allowance and against the extension of time. If the charge is true that two of the members signed the petition to themselves and, they were of the three who voted for the granting of the license, we have this unusual condition of a license being issued by the vote of *one* disinterested man over the opposite vote of two, for no one could claim that the two who signed the petition were disinterested. It is to be hoped that the charge here made is a mistake. The fact that an official oath sits so lightly upon the conscience of any officer as to permit him thus to become a partisan in a proceeding before himself is not to be believed except upon the most indubitable proof."

In addition to the prayer of the plaintiff's petition against the said village board, as stated in the fore part of this opinion, the petition also contains a prayer against the said Lena Klindt and Lena Staltenberg, who were also defendants in this proceeding, "that the license issued to said Lena Klindt and Lena Staltenberg by said trustees, May 1, 1886, be canceled and repayment made *pro tanto* of the amount paid for the same for the unexpired time," etc.

Whether this latter prayer of the plaintiff ought to be answered will depend upon the decision of the question raised by the remonstrance, whether the petition for license is signed by at least thirty of the resident free-holders of

said village of Arlington, within the true intent and meaning of the statute in such case made and provided. Should it be the final decision that it does not, then it will doubtless become the duty of the said village board to cancel the said license as having been illegally and improvidently issued. And upon such cancellation the said Lena Klindt and Lena Staltenberg will be entitled to a repayment of a portion of the sum paid into the village treasury for said license, bearing the same relation to the whole sum so paid as the unexpired portion of the year for which the same was granted bears to the whole year. But mandamus will only lie to a public officer or board to enforce the performance of a present and ascertained duty, and in cases where the respondent is in default of the discharge of such duty; and we are now bound to presume that upon the occurrence of the result of the trial of the question above referred to making it the duty of said board to cancel the said licenses that that duty will be promptly performed.

A peremptory writ of mandamus will issue to said respondent board, commanding them to convene in session without delay and appoint a day for hearing of said case, which shall be so fixed and appointed as to allow the parties reasonable time to prepare for such hearing, and the said remonstrators, especially the plaintiff in this proceeding, have due and reasonable notice of the day so appointed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

ELLIS SHRIVER, APPELLEE, V. WILLIAM E. MCCLOUD,
APPELLANT.

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1. **Trial: EVIDENCE.** The evidence examined and found sufficient to sustain the finding and judgment.
 2. **Partnership.** A partnership formed for the purpose of carrying on a legitimate business, such as buying and shipping fat cattle, will not be held illegal, immoral, or *contra bonas mores*, by reason of *sharp* or fraudulent practices used or suffered by the parties in the prosecution of such business.
 3. ———: **EVIDENCE.** Where it is equally the duty of each member of a partnership to see that the certificate of such partnership is recorded, as required by law, neither one of the partners can avail himself of the failure to perform such duty in an action between such partners.
 4. ———: ———. As between partners, the ultimate facts whence a partnership is deduced are, first, the agreement, and, second, its execution; summed up as the executed agreement. *Grover v. Tallman*, 8 Nev., 78.

APPEAL from the district court of York county. Heard below before NORVAL, J.

France & Harlan and *John H. Ames*, for appellant.

Sedgwick & Power, for appellee.

COBB, J.

The petition in the court below alleged "That in the month of March, 1883, the plaintiff entered into an agreement with the defendant to form a partnership with him in the business of buying cattle, in York county, in this state and vicinity, and shipping the same. The terms of said agreement being, in substance, as follows: The plaintiff to furnish the capital and devote so much of his time to said business as might be necessary, and the defendant to devote his time to said business and furnish a horse and buggy to be used in said business, and the plaintiff and

defendant to share in the profits and losses of said business equally, the said partnership to continue during the spring of the year 1883.

"2. And the plaintiff and defendant then entered upon and carried on said co-partnership business under said agreement until the same was terminated on or about July, 1883, and said co-partnership was terminated prior to the 1st day of May, 1883.

"3. And during the continuance of said co-partnership this plaintiff was compelled to and did advance and pay on account of said co-partnership business the sum of \$8,502.-53, and has received from said co-partnership business the sum of \$7,064.50 and no more.

4. That said defendant has not paid or advanced on account of said co-partnership business any sum whatever in excess of the amount that said defendant has received from the said business of the co-partnership," with an allegation of a demand upon said defendant for an accounting and payment of the amount due him, and a prayer for an accounting and judgment and general relief.

The defendant answered with a general denial.

There was a trial to the court, with a finding and judgment for the plaintiff. The defendant brings the cause to this court by appeal.

There is no assignment of errors.

It appears from the bill of exceptions that there was evidence tending to prove that in the month of March, 1883, the defendant, a resident of York county in this state, wrote to one Wade, of Chicago, a salesman of live stock, with whom he had been acquainted for about fifteen years, to the effect that there was a number of cattle being fed in his, McCloud's, county, and that he thought that the cattle could be bought right, and that he wanted Wade to come out there, or send some good man there, to go in with him and buy the cattle, that he felt a little rusty in regard to cattle, as he had not been shipping much lately.

Wade shortly afterwards wrote to Shriver, the plaintiff, at Harvard, Iowa (whom he had also known for about fifteen years), the contents of McCloud's letter. A few days thereafter Shriver went into Chicago with cattle, and Wade talked with him as to what McCloud had written. Shriver enquired about McCloud, and said he would go out (to Nebraska), and Wade gave him a letter of introduction to McCloud. The evidence also tends to prove that soon after the above occurrence Shriver came to Waco (the residence of McCloud), met McC., and delivered to him the letter of introduction from Wade. That this letter contained a statement that Shriver came out there for the purpose of going into partnership with him to buy some cattle. That upon receiving the letter of introduction, McCloud took Shriver to his house with him, and as to what took place between the parties on that evening at the house of McCloud, while the evidence is conflicting, it tends to prove that they then and there entered into a co-partnership for the purpose of buying and shipping cattle. The terms of this partnership, though not very definite, were, I think, sufficient for the purpose in view. By its terms Shriver was to furnish the cash capital to pay for the stock to be purchased. Part of this money he claimed to have with him, and had, so far as appears, and part he professed to be able to obtain from Wade or the firm of which he was a member or employe, and McCloud was to furnish teams for the purpose of local travel and pay the local expenses of the business, and the two partners would share the profits and losses. The evidence tends to prove that the next day after entering into the said agreement of partnership, Shriver and McCloud together entered upon the business of looking up and buying cattle, that at the suggestion and request of McCloud the contracts of purchase were made in the name of Shriver alone, and nothing was said about McCloud being interested in such purchases, but that he nevertheless was a full partner therein.

In this manner the firm purchased and shipped three shipments of cattle, and made an advancement to Harvey Pickrel on a bunch of cattle of \$400, which they forfeited. In these operations they lost, as found by the court, the sum of \$1,425.08. All of which was made good and paid by the plaintiff.

It cannot be denied that there is conflicting evidence upon the most material point in the case—the formation of the partnership between the parties. The agreement of partnership, as found by the court, took place between them without the presence of any third person, and is evidenced by no writing then executed. It is sworn to by one party and denied by the other. In such cases the disagreeable duty devolves upon the trial court or jury to decide which to believe and which to charge with the infirmity of a bad memory, or that obliquity of perception into facts unfavorable to their own side, which sometimes exists in parties to law suits. This duty is often imposed upon courts and juries, when there are no outside or collateral facts in the case to point out the party whose witnesses are most reliable; but in the case at bar, the trial court, to whom the facts were submitted, found much to aid him in the contemporaneous and antecedent acts of the defendant. The letters of the defendant to Mr. Wade, as deposed to by the latter, show clearly that shortly before the first visit of Shriver to Waco, McCloud desired and solicited Wade, “to come out there, or send some good man there, to go in with him and buy the cattle,” referring to cattle which he had already informed Wade were being fed in York county for the Chicago market. Now this independent circumstance was an important aid to the court in determining between the conflicting statements of Shriver and McCloud, whether, upon the former, a few days thereafter, calling upon the latter at his home with a letter of introduction from Wade, their talking over the matter of the cattle being fed in the neighborhood during

the evening, and in the morning going out among the cattle feeders and buying quantities of cattle on that and succeeding days, the cattle were purchased in pursuance of a contract of partnership for that purpose, formed on the evening of the first meeting and conversation, at the house of McCloud, or that McCloud was not interested in such purchases but was only conveying Shriver around through the cattle feeding region of York county, with a view of picking up a few stock cattle to feed himself. Upon the other hand, the fact that the written contracts of purchase of the cattle purchased were made in Shriver's individual name, was a circumstance against him to be considered by the trial court. Whether that circumstance is sufficiently explained by the statement of Shriver in his testimony, that when they first started out to buy cattle, as they were riding along, he (McCloud) said, "Shriver, I would prefer to be a silent partner in the business for a while. I think it would be the best way to buy the cattle, for me to take you around and introduce you to the people as my friend from Iowa, and for me to leg around the corner for you, and try to induce them to sell to you; he says, 'you do the buying and I will try to get them to sell to you. I am acquainted with a good many people that are feeding cattle.' I says to him, 'you are acquainted with the business, and I will leave that to you, to do whatever you think is best.'" This was a question for the trial court to determine from all the facts in the case.

Before passing from this branch of the case, I will consider the fourth point of appellant's brief, which refers to the above testimony of Shriver. Counsel say in the brief, "It is a fundamental principle of law that he who seeks equity must do equity. The evidence of plaintiff, Shriver, shows that he entered into a corrupt agreement with defendant, McCloud, to cheat and defraud the citizens of York county. They were to tell the citizens who had cattle to sell that McCloud was not a partner, but was going

around with Shriver to introduce him and advise the citizens to sell, or in the language of Shriver :

“Q. Did McCloud say to Morrison that he did not have anything to do with this matter, but that they had better sell to you, that you were offering big prices ?

“A. Why, he may have said that ; that was the agreement, that he was to leg around the corner ; he was to try to get them to sell and I was to buy.

“Q. You in his presence did not contradict that ?

“A. No, sir.

“Q. Did he talk that generally wherever you went ?

“A. Wherever we went.”

Had these parties really defrauded any of the people of whom they bought cattle and a question had arisen between such persons and the alleged partnership or either member of it, then probably the above evidence would have tended to estop them to allege a partnership. But not in a controversy between the partners. The evidence does not tend to prove that the object and purposes of the partnership or business in which it was to engage were either illegal, immoral, or *contra bonas mores*, nor that the peculiar manner in which the business was conducted was at all contemplated in the formation of the partnership ; and when the business resulted in a loss, to allow a member of the firm to avoid his share of the consequences through the consideration of a mere sharp practice used in the manner of prosecuting the business, devised and suggested by himself, is a proposition which needs only to be stated.

Much in a line with the above is appellant's second point, to the effect that the plaintiff ought not to have been allowed to set up and prove a partnership between himself and the defendant, there being no record of the same ; and he cites sections 27, 28, and 29, chap. 65, Comp. Stats. I do not think that these sections have ever been construed by the supreme court, and it is not my purpose to discuss them now, further than to say that if they are at all appli-

cable to a partnership doing business in the name of one or all of the partners, it is very sure that its provisions cannot be invoked by one of the partners who is in *pari delicto* with the others.

Appellant's first point is directed to the plaintiff's petition, claiming that it does not state facts sufficient to constitute a cause of action. First, under this head, that it does not state in terms that the parties were partners. When it is borne in mind that pleadings consist in the allegation of facts, and not in the statement of conclusions, and the petition is examined as to its contents, it will be seen that under our liberal system of pleading it is sufficient as to the point we are now considering. By reference to the petition copied in the fore part of this opinion, it will be seen that after the allegation of an agreement entered into between the plaintiff and the defendant "to form a partnership in the business of buying cattle in York county, Nebraska, and vicinity, and shipping the same," and setting out the terms of the agreement; then follows the allegation that "the plaintiff and defendant then entered upon and carried on said co-partnership business, under said agreement, until the same was terminated, on or before the first day of July, 1883, and said co-partnership was terminated prior to the first day of May, 1883 (?)" This is an allegation of all the provable facts necessary to the conclusion of fact and of law, that the parties were partners for a time, and that such partnership had been dissolved. Any further allegations that they were partners would only be to state a conclusion, only to *label* the relationship which the facts stated show that they bore towards each other. See *Grover v. Tallman*, 8 Nev., 178, cited by counsel for appellant. This also answers the succeeding suggestion that the petition fails to allege the dissolution of the co-partnership. I do not understand that in this case it was necessary to allege the existence of unsettled accounts other than that due the plaintiff. There were no unsettled demands

Shriver v. McCloud.

outstanding against the partnership, strictly speaking, and the balance claimed by the plaintiff is sufficiently stated.

The third point made by counsel for appellant is that the partnership, if any existed between the parties, was only in a single adventure, for which Shriver furnished the capital, and McCloud the labor and skill, the property in which the capital was invested remaining the property of Shriver, and McCloud to have a share of the profits in the nature of compensation for his labor and skill, in which case he would not be liable for any part of the losses. To this he cites *Heran v. Hall*, 35 Am. Dec. (1 B. Mon., 159), 178. Were the point and authority applicable to the case at bar, it would be conceded. But the case at bar is not one of a single adventure, and according to Story (Story on Part., § 27, also cited by counsel for appellant), even in case of a single adventure, and the whole capital is furnished by one party, it requires a special agreement to prevent the conclusion of a community of interest in the property as well as in the profit and loss.

I therefore reach the conclusion that a cause of action is stated in the petition, and that the evidence is sufficient to sustain the finding and judgment.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

The other judges concur.

SAMUEL WALKER, PLAINTIFF IN ERROR, V. PATRICK HAGERTY, DEFENDANT IN ERROR.

1. **Attachment: CAUSES FOR.** To justify a party in causing an attachment to issue against the property of a debtor, at least one of the causes of attachment mentioned in the statute must exist.
2. ———: ———. Mere insolvency of the debtor, even if it exist, is not a cause of attachment.
3. ———: **EVIDENCE.** On the testimony in the record; *Held*, That the attachment was properly dissolved.

ERROR to the district court for Holt county. Tried below before TIFFANY, J.

Thomas O'Day, for plaintiff in error.

H. M. Uttley, and *Thurston & Hall*, for defendant in error.

MAXWELL, CH. J.

In August, 1885, the plaintiff brought an action in the district court of Holt county against the defendant, upon a promissory note, to recover the sum of \$3,942.37, with interest at ten per cent from August 1st, 1885, and caused an attachment to issue in said action upon the following grounds:

" 1st. The defendant is about to convert his property into money for the purpose of placing it beyond the reach of his creditors, and

" 2d. Has property and rights in actions which he conceals, and

" 3d. Has disposed and conveyed a part of his property with intent to defraud his creditors, and

" 4th. "Has assigned part of his property, with intent to defraud his creditors, and

Walker v. Hagerty.

"5th. Is about to assign and dispose of a part of his property with intent to defraud his creditors."

On the 1st day of September, 1885, the defendant filed motion to dissolve the attachment, and as grounds therefor claimed that the "facts stated in affidavit for attachment are not true, and for other irregularities in the attachment."

Defendant also filed his affidavit with motion denying grounds of attachment stated in affidavit. On the nineteenth day of February, 1886, the court ruled thereon, and ordered that the attachment heretofore granted be dissolved and discharged, to which plaintiff excepted.

The note in question was given to A. N. Schuster & Co., of St. Joseph, Mo., and by them transferred after it became due to the plaintiff, as stated by the plaintiff in his affidavit, "for reasons of business convenience."

The defendant has made the following payments on said note, viz:

| | |
|--------------------------|--------|
| June 23d, 1883..... | \$ 500 |
| July 12th, 1883 | 800 |
| September 1st, 1883..... | 500 |
| October 16th, 1883 | 500 |
| May 31st, 1884 | 400 |
| June 21st, 1884..... | 25 |

| | |
|-------------|--------|
| Total | \$2725 |
|-------------|--------|

Leaving a balance due of \$3942.37. The plaintiff, it appears, is the cashier of the banking firm of Schuster, Hax & Co., of St. Joseph, Mo., and went to O'Neill in August, 1885, and called upon the defendant, who refused either to pay or secure the note. The defendant, it appears, claimed that he was entitled to certain off-sets, which he alleges Schuster & Company had agreed to allow him, and he seems to have supposed that the note was transferred to the plaintiff by them to avoid compliance with their agreement. This, in fact, does not seem to have

been the purpose of that firm. It is evident, however, that the defendant supposed that an attempt was being made to obtain an advantage over him.

The affidavit of one Thomas Carlon shows this to be the fact. The affidavit is as follows:

"I am the attorney for the above-named defendant, and was present at the conversation mentioned in the affidavit of Thomas O'Day, filed herein, as having taken place between O'Day and Hagerty. I had previously told Mr. Hagerty that the note was subject to any defense he might have against Schuster & Co., the payees of the note; that he was entitled to credit thereon for any damages he had sustained at the hands of said Schuster & Co., and for all set-offs and claims he had against said firm. This advice was based on facts stated to me by Mr. Hagerty. Mr. Hagerty was very indignant at the treatment he was receiving at the hands of said firm, in not being allowed the credits on said note which he claimed was due him, and said substantially that he would fight it through, and would make all the defense he could to the note, and they should not have a dollar of his money not justly due; that if he was allowed proper credits on said note, he would settle at said time. Mr. Hagerty was very indignant; his statements were confined to a denunciation of plaintiff's conduct, and his determination to resist the imposition and defend himself. Have known Mr. Hagerty, defendant, for three years and a half; all I have seen of him has been upright; his reputation has been, and still is, exceptionally good."

Thomas Golden also swears that he heard the conversation referred to above. "I heard Hagerty express himself as being very indignant at the conduct of Walker, and that he was determined to fight him; but it is not true that Hagerty said anything intimating that he had his property where the law could not reach it."

Benjamin Gallagher also swears: "I was present at the

time O'Day came in, and heard all of the conversations at both of the times, in Mr. Hagerty's store, named in said O'Day's affidavit, filed herein; at no time during that conversation did Mr. Hagerty express any intention of escaping legal liability. Mr. Hagerty told Mr. O'Day that he did not owe the amount claimed; that Walker's claim was fraudulent, and rather than pay such an unjust and wrongful claim, he would prefer to see the property burn; but that he, Hagerty, would pay everything and all that was justly due on said claim, which he then and there offered to do. He did not at any time 'insinuate,' by word or action, that he had his property where the law could not reach it, nor that he could beat an execution, or anything equivalent thereto. Mr. Hagerty was rather indignant, and when threatened with suits, met it pretty defiantly, but all his remarks were to the effect that the claim was fraudulent, and could not be brought into judgment. Any statements to the contrary are a perversion of the testimony, and incorrect."

The testimony tends to show that the defendant was indebted to various persons named in about the sum of \$19,000, in addition to the amount of the plaintiff's claim; that his assets at that time amounted to at least \$27,000. The uniform testimony of the men with whom he had been dealing, except the plaintiff and those in his interest is, that the defendant had conducted his business in such a manner as to indicate an intention to pay his debts; and there is absolutely no evidence showing the transfer or concealment of property by him for the purpose of defrauding his creditors.

To authorize an attachment at least one of the causes mentioned in the statute must exist. Code, § 198. Mere insolvency, even if it had existed in this case, is not a ground of attachment. A man may be unable to pay his debts in full and still be doing all in his power to pay them, and so long as he furnishes no statutory cause of attachment against

him, no attachment will lie against his property. Neither will denials of the validity of the claim sued upon, and a determination to fight it, furnish cause to attach the defendant's property. The rule might be different, however, if such expressions were accompanied with acts constituting a cause of attachment. As we do not find sufficient cause in the record for the attachment it is evident that the judgment is right and must be affirmed.

JUDGMENT ACCORDINGLY.

The other judges concur.

| | |
|----|-----|
| 20 | 486 |
| 21 | 688 |
| 23 | 810 |
| 30 | 486 |
| 38 | 76 |
| 20 | 486 |
| 55 | 647 |

ANNA M. G. MCCORMICK, APPELLANT, V. ALGERNON
S. PADDOCK, ET AL., APPELLEES.

1. **Judgment: COLLATERAL ATTACK.** A judgment rendered against a person—and equally so of one rendered in his favor—after his death is reversible, if the fact and time of death appear on the record, or in error *coram nobis*, if the fact must be shown *aliunde*. It is voidable, and not void, and cannot be impeached collaterally. *Jennings v. Simpson*, 12 Neb., 558, citing *Tuple v. Titus*, 41 Penn. State, 195.
2. **Jurisdiction: INSANE DEFENDANT: GUARDIAN AD LITEM.** A court, by the service of its process, acquires jurisdiction over the person of an insane defendant, and the failure to appoint a guardian *ad litem* does not render the judgment either void or voidable. It is at most only erroneous, for which the appropriate remedy is by proceedings in error, and not by an original action to vacate the judgment. See *McAllister v. Lancaster County*, 15 Neb., 295.
3. **Summons: SERVICE BY PUBLICATION.** An affidavit for service by publication is sufficient if it states the nature of the cause of action for which publication may be made, and that service of summons cannot be made upon the defendant or defendants within the state, *Fouts v. Mann*, 15 Neb., 172, and it is not necessary that the statement that service of summons can-

McCormick v. Paddock.

not be made upon the defendant in the state, be made in the language of the statute. If the fact is made to appear by the affidavit it is sufficient.

4. ———: ———: SUFFICIENCY OF NOTICE. When service of the pendency of the action is made by publication, if the published notice is so specific as to advise the defendants of their interest sought to be affected by the proceeding it is sufficient. See *Gary v. May*, 16 Ohio, 66.

APPEAL from the district court of Douglas county.
Tried below before WAKELEY, J.

George W. Ambrose and John M. Thurston, for appellant.

George W. Doane, Arthur C. Wakeley, T. M. Marquett, Kennedy & Gilbert, and H. J. Davis, for appellees.

REESE, J.

This action was instituted in the district court of Douglas county to quiet the title of plaintiff to certain real estate. The defendants filed a general demurrer to the petition. The demurrer being sustained and the case dismissed, plaintiff appeals to this court, assigning for error the ruling of the district court in sustaining the demurrer.

The averments of the petition are in substance that, on and before the 21st day of November, 1868, one George R. Smith was the owner of an undivided interest in the land in controversy, and that one Mary Ann Harrington was the owner of the remaining interest. As to what portion of the property each one owned is not material to this decision. On the last-named date Smith commenced an action in the district court for partition of the land, caused service to be made by publication, and obtained a judgment for partition. Three commissioners were appointed by the court to make the division, or in case partition could not be made without prejudice to the owners, to report the fact to the court. The referees reported that owing to the

irregular boundaries of the land, its oblong shape, and uneven surface, partition could not be made without great prejudices. On the return of this report the property was ordered to be sold by the referees, which they did, and reported having sold the same to the plaintiff in the action for the sum of \$3,729.15; that they paid over to the plaintiff \$2,331.00, his share of the proceeds of the sale, and that they held, subject to the order of the court, the sum of \$1,398.15, the share of the defendant, Mary Ann Harrington. The report of the referees was confirmed, the deed ordered to be made to Smith, and the money belonging to Harrington directed to be paid to the clerk, to abide the further order of the court, all of which was done. That at the time of the commencement of the action for partition the said Mary Ann Harrington was insane and was confined in the state lunatic asylum at Utica, New York, until the time of her death, which occurred on the 26th day of January, 1869, which was prior to the rendition of the judgment for partition and appointment of the referees. That on the first day of March, 1862, the said Mary Ann Harrington by her last will and testament bequeathed the property to one J. R. Benedict, who survived her and took title under the will. That prior to his death he bequeathed the property to his executors, named in the will executed by him, and gave them full power and authority to sell and convey the same upon such terms and conditions as to them should seem proper, and that plaintiff had purchased the property and was now the owner thereof to the extent of Harrington's interest.

It is alleged that defendants derive their title from Smith, the plaintiff and purchaser at the partition sale; that he acquired no title by said purchase, and that defendants have no title. That neither the said Mary Ann Harrington, the devisees, inheritors, or plaintiff, appeared in said partition proceedings, or accepted the proceeds of the sale, and that the judgment, orders, sale, and the deed thereunder were void for want of jurisdiction.

The proceedings are attacked upon two grounds—1st, that the affidavit of non-residence, and by virtue of which the publication of notice was made, and the published notice, were not in conformity with law, and conferred no jurisdiction upon the court to render its decree; and 2d, that at the time of the service of summons by publication, the said Mary Ann Harrington was insane, and at the time of the rendition of the decree she had died, and no proceedings were had to revive the action as against her legal representatives.

The principal contention in this court was upon the first of the above named grounds. As to the second, it seems pretty clear that if jurisdiction was obtained by the publication of the notice, the subsequent death of the defendant would not render the further proceedings void. *Jennings v. Simpson*, 12 Neb., 558, and cases cited by appellees. Nor would the fact of the insanity of the defendant have that effect. *McAlister v. Lancaster County Bank*, 15 Neb., 295.

Our attention must then be directed to the first alleged reason why we should hold the judgment for partition void.

The affidavit to which attention is called is alleged to be so defective as to furnish no authority for the publication of the notice. It is said that it fails to comply with that part of section 78 of the civil code which provides that—"Before service can be made by publication, an affidavit must be filed, that service of summons cannot be made within this state, on the defendant or defendants to be served by publication, and that the case is one of those mentioned in the preceding section" (77). By reference to that part of the affidavit material to this inquiry, we find that it contains the following averments: That on the 21st day of November, 1868, the plaintiff (affiant) "filed in the above named court a petition against the said Mary Ann Harrington, defendant, praying that partition might be made by said court of the following described piece of land,"

describing it and stating the interests of the plaintiff and the defendant. The affidavit then continues:

"And, further, deponent saith that the said defendant is a non-resident of this state, and now absent therefrom, and that service of summons in this action can only properly be made by publication, which service this deponent desires to make, and hence this affidavit—the sheriff having returned upon the summons herein issued that said defendant cannot be found in this bailiwick, the said Douglas county, after diligent search; and, further, deponent says that he has no knowledge of the residence or the whereabouts of said defendant at this time, nor has he known for several years last past where she was to be found during said time."

It is urged that the affidavit does not sufficiently state that "service of summons cannot be made within this state" on the defendant to be served.

It is true that the affidavit does not follow the exact words of the statute; but if enough is stated to show the existence of the facts necessary to be established by the affidavit, it is sufficient. *Grebe v. Jones*, 15 Neb., 315. *Fouts v. Mann*, Id., 172.

It was shown by the affidavit that the defendant was a non-resident of the state, and was absent therefrom, could not be found by the sheriff, and her residence was unknown to the affiant. If she was a non-resident, and not within the state, it would seem to be shown that personal service could not be made within the state. *Miller v. Finn*, 1 Neb., 254.

It is insisted that the published notice was defective, and that by reason of such defects no jurisdiction was obtained, and for that reason the proceedings are void. The objection is that there was not a compliance with the requirements of section 79 of the civil code, wherein it requires that the notice "must contain a summary statement of the object and prayer of the petition," etc. The part of the notice

objected to is that the cause is pending "wherein said George R. Smith demands partition of the following described real estate," describing it, and setting out at length the ownership or interest of both plaintiff and defendant, and that at the time named "the said George R. Smith will apply to said court for partition to be made in said premises, according to the statement above of the title thereto." We quote from the brief of appellant as follows:

"Under the statute relating to partition the duty of the court was two-fold—to make partition or sale. Such also was the prayer of the petition. The object and prayer then was to have one or the other done. The notice was to do one only. Had the court then any jurisdiction to do more than set off to each joint owner their respective shares? To do more, notice of the object and prayer was necessary." By this it will be seen that the contention is that a notice that plaintiff demands the "partition" of the real estate described in the notice is not a sufficient statement of the "object and prayer" of the petition, since it often happens, as in that case, that partition is impracticable, and a sale becomes necessary. Therefore the notice should contain a statement of the "object and prayer" in the alternative form—i.e., a partition or sale of the property.

By sections 77 and 51 of the civil code it is provided that service may be had by publication when the action is "for the partition of real property." Title 26 of the same code, section 802 *et seq.*, provides for the maintenance of actions, the object of which is to effect the partition of real property among joint owners, etc. In neither case do we find any permission for another action the object of which is to "effect the partition of real property or in case partition cannot be made, for a sale thereof." The *action* is simply *for partition*. Section 811 *Id.*, provides that "after all the shares and interests of the parties have been settled in any of the methods aforesaid, judgment shall be rendered confirming those shares and interests, and directing that parti-

tion be made accordingly." This, then, is the object of the action. But it sometimes happens that the judgment of partition, or division, of the land itself cannot be made effectual without loss to the owners; and in that case the court entering the judgment of partition may order the land sold without the specific division being made, and in lieu of setting off to each party to the action his share of the land a partition of its value, as realized from the sale, is made. This is all done in an action for "partition," and by virtue of a judgment for partition, and can in no case be made without such judgment. The action is simply one for the partition of real estate, and a notice so styling it—with a description of the real estate involved in the action, and of the interests of the joint owners as was done in that case—is sufficient to confer jurisdiction. Maxwell's Pl. and Pr., 1885, ed. 81.

It follows that the decision of the district court was correct. It is therefore affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

FRANK HELDT, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law: CONFESSIONS AS EVIDENCE.** Where a detective in the guise of a friend induced a suspected party to make a confession of a crime without inducements of any kind except at his request, he said that he had consulted an attorney for the prisoner who said "he (the prisoner) had better tell the facts of the case, and that they would be likely to do him as much good as anything he could do; that there was no use lying about it, and he had better tell the truth," *Held*, 1, That the alleged confession was admissible in evidence; 2, That the credibility of a witness, who by deceit, misrepresentation, and other dis-

90 499
25 188

20 492
31 407

20 492
34 600

20 492
49 354

42 519
43 735

20 492
46 190

44 500
46 553

46 610
20 492

45 885
45 880

20 492
47 643

20 492
49 782

51 315
51 696

52 549
20 492

56 500
90 499

158 776

Heldt v. State.

credible means has obtained an alleged confession from a prisoner is for the jury, who should be specially instructed on that point.

2. ———: **REASONABLE DOUBT.** An instruction that persons sometimes say they are morally certain of the existence of a fact or facts, but have not the evidence to prove it, this—is the condition of mind one is in when convinced beyond a reasonable doubt, is erroneous.
3. ———: **ALLEGATIONS UNCONTRADICTED NOT REGARDED AS PROVED.** Where the defendant in a criminal case has pleaded not guilty, the jury, in order to convict him of the offense charged, must find from the evidence that he is guilty, and the court has no authority to say to them that certain allegations are uncontradicted, and therefore may be by the jury considered as proved. The credibility of the witnesses must be submitted to the jury.
4. **Instructions: EXCEPTIONS.** Instructions must be excepted to in order to obtain a review of them in the supreme court.
5. **Criminal Law: EVIDENCE OF ACCUSED: ARGUMENT OF PROSECUTOR.** If a person accused of crime testifies in his own behalf he is to be treated as any other witness, and if he fails to deny a material fact which has been testified against him, the district attorney may comment upon such omission in his argument to the jury.

ERROR to the district court for Colfax county. Tried below before TIFFANY, J., sitting for POST, J.

J. W. Brown, for plaintiff in error.

William Leese, Attorney General, for defendant in error.

MAXWELL, CH. J.

The plaintiff was indicted by the grand jury of Colfax county for wilfully, unlawfully, and feloniously placing railroad ties on the Union Pacific railway track to obstruct the same, and was found guilty and sentenced to imprisonment in the penitentiary for ten years. The errors assigned will be noted in their order.

1. That the court erred in admitting the testimony of

one Tuffield as to an alleged confession made by the plaintiff to him. His testimony is as follows:

"I am a detective, I was with the defendant Heldt at Neligh's office in Omaha. Heldt was under arrest. I was supposed to be under arrest too.

"I proposed to go and see an attorney. I let on I was going to see an attorney, and I went to see my brother. I returned to Neligh's office, from there they took me to jail; Heldt had gone to jail before me; we were put in the same cell together. I talked to Heldt in the jail. I told him that I had seen an attorney and I would be very likely to be let out to-morrow; I could be out as soon as they got to Schuyler and found out what I had been doing, that my character was here, and that I would see an attorney as soon as I got back. Heldt asked me if I had seen an attorney. I said yes, and told Heldt what he had said in regard to him, and I told Heldt that the lawyer said he had better tell the facts of the case, and that would be likely to do him as much good as anything he could do; that there was no use lying about it, and he had better tell the truth. Heldt said he would, but he did not know how to go at it, or get it out to his lawyer. I said it would be easy enough done, and finally he asked me where he could get some paper. I said he could easy get it if he rattled the jailer, and he did call him, and the jailor came after a bit. Joseph Miller was the jailer. I went and got the paper. I said I would like to telephone to Judge Bennett. I wanted to telephone to other parties, but I found I could not, and when I got back I said I could not do it as there was no connection, but I took the paper back for him to write on, and when he got the paper he said, what did I think was the first thing for him to put in it? And I said I could not tell him; that I did not know anything about it; that I was innocent. He said, yes, I know you are innocent. I told him to tell the truth, and he said that as soon as he started to talk they

would let me go. And he went on and started it, and he wanted to know how to finish it, but I believe he knew then that I was not a very good scholar, and could not have done it if I had tried, so he just finished it himself. I believe he wrote Judge Bennett's name on the outside, and he wanted to know how he could send it, and I said, rattle up the jailer again, and he did and handed it to him. He wrote it up against the cell wall. (Here exhibit D was shown to the witness.) Yes, sir, this is the paper, but there is something here that I do not think he put on himself. I saw it, but I could not tell what was on it; whether it was Judge Bennett, or what it was; he handed it to Mr. Miller, the jailer; he gave me another one when he had written that. I asked him, I said: as you have made up your mind to confess this, and if your wife knows anything about it you had better write and tell her what you are going to do, so as there would be no mistake; and he said he would write and tell her he was going away for a day or two, and that would be an excuse for him not coming home. Then he wrote this paper, marked exhibit C. He remained in jail until Monday morning. This was Saturday night about six o'clock, I should judge, on the 22d. He staid there until Monday, that would be the 24th. Then he was brought to Schuyler on the train."

Exhibit D is as follows:

"OMAHA, Nov. 22d, '84.

"Regarding this wrecking affair, would say that I had no intention to hurt either human beings or to damage any property, but took especial pains to have the train notified in time to prevent all accidents. My object being to get into the good graces of the railroad company and thereby get a job, which I was in need of, as I could find nothing else to do, and I am willing to swear to the foregoing confession.

"FRANK HELDT."

Written below the confession is the following:

"Received this letter from Frank Heldt in county jail Nov. 22, '84, 8 P.M.

"J. S. MILLER."

This letter seems to have been open, but was addressed to "Judge Bennett, Omaha, Neb."

The rule is well settled that a promise of benefit or favor, or a threat or intimation of disfavor connected with the subject of the charge, held out by a person having authority in the matter will be sufficient to exclude a confession made in consequence of such inducement either of hope or fear. *R. v. Morton*, 2 Mo. & R., 514. *R. v. Swatkins*, 4 C. & P., 548. *R. v. Mills*, 6 C. & P., 146. *R. v. Shepherd*, 7 C. & P., 579. *R. v. Enoch*, 5 C. & P., 539. But mere advice to tell the truth, where there is neither a threat or an inducement, is not sufficient to render the confession inadmissible. To be admissible, however, it must appear that the confession was entirely voluntary. The necessity for this rule is very clearly stated in *State v. Fields*, Pecks. Rep., 140, that "the evidence of such confessions is liable to a thousand abuses. They are made by persons generally under arrest, in great agitation and distress, when each ray of hope is eagerly caught at, and frequently under the delusion, though not expressed, that the merit of a disclosure will be productive of personal safety. To disclose the confession is odious as a breach of confidence; which it is at all times. The confession is made in want of advisers, under circumstances of desertion by the world, in chains and degradation, with spirits sunk, fear predominant, hope fluttering around, persons and views momentarily changing, a thousand plans alternating, a soul tortured with anguish, and difficulties gathering into a multitude—how easy it is for the hearer to take one word for another, or to take a word in a sense not intended by the speaker. And for want of an exact representation of the tone of voice, emphasis, countenance, eye, manner, and action of the one who made the confession, how almost impossible

is it to make a third person understand the exact state of his mind and meaning. For these reasons such evidence is received with great distrust and under apprehensions of the wrong it may do. Its admissibility is made to depend on its being free of the suspicion that it was obtained by any threats of severity or promises of favor, and of every influence, even the minutest."

The plaintiff testified in his own behalf, and his testimony, if true, shows that Tuffield had been in his company at Schuyler for several days, and that they were on very intimate terms, and frequently visited some of the saloons of that place; that the plaintiff regarded him as a friend, and did not suspect that he was a spy upon his actions.

A man who will deliberately ingratiate himself into the confidence of another for the purpose of betraying that confidence, and while with words of friendship upon his lips seeks by every means in his power to obtain an admission which can be tortured into a confession of guilt, which he may blazon to the world as a means to accomplish the downfall of one for whom he professes great friendship, cannot be possessed of a very high sense of honor or of moral obligation. Hence the law looks with suspicion on the testimony of such witnesses, and the jury should be specially instructed that in weighing their testimony greater care is to be exercised than in the case of witnesses wholly disinterested. *Preuet v. People*, 5 Neb., 877. The weight to be given to such evidence is a question for the jury and cannot be urged against its admissibility.

The confession, however, seems to have been voluntary, although made to one who deliberately and repeatedly deceived and made false statements to the plaintiff to obtain it. It is doubtful if anything is really gained in the administration of the law from the admission of such testimony, and the consequent encouragement of the courts of the practice. If it is answered that confessions are thus ob-

tained which otherwise could not be had, it may be said in reply that the same is true of the rack and wheel by means of which confessions were formerly forced from its victims, but which experience showed were entirely unreliable. So far as appears, the plaintiff confided in this man as his friend and was betrayed by this professed benefactor. The testimony of such a man may be entitled to but very little credence, yet it must be submitted to the jury. The first objection, therefore, is untenable.

2. The court, among other instructions, gave the following:

"3d. You are instructed that it is incumbent upon the state to prove beyond a reasonable doubt every material allegation of the indictment, and in this case the material allegations are that the Union Pacific railroad was a railroad in operation in the county of Colfax on the 28th day of October, 1884, an obstruction was placed upon the track of the said railroad, as charged in the indictment, and that the obstruction on the track was wilfully and maliciously placed there by the defendant, Frank Heldt. The first two allegations are uncontradicted, and therefore may be by the jury considered as proved.

"4th. You are instructed, therefore, that in this case the only material allegation to which you need direct your attention, and the truth of which you must be satisfied beyond a reasonable doubt before you can find the defendant guilty, is, did the defendant wilfully and maliciously place the obstruction upon the track, as alleged?

"5th. You are instructed that by reasonable doubt is meant such a doubt as naturally arises in the mind of the jury, after a careful consideration of all the evidence, and from the evidence a doubt which the juror can give a good and valid reason for having. It is not a mere idle, unreasonable doubt which the juror may conjure up in his mind, and for which he can give no satisfactory reason. Persons sometimes say they are morally certain of the existence

of a fact or facts, but have not the evidence to prove it. This is the condition of mind one is in when convinced beyond a reasonable doubt. It is a moral conviction of the truth of the allegation."

It is said in the 5th instruction that "persons sometimes say they are morally certain of the existence of a fact or facts, but have not the evidence to prove it. This is the condition of mind one is in when convinced beyond a reasonable doubt." Just what is meant by these words is not entirely certain; but it is reasonable to suppose that the jury considered them to mean that if the jury were morally certain of the guilt of the accused, even without evidence to prove it, they might find him guilty. In other words, that suspicion might supply the place of evidence. The principle is firmly imbedded in the common law, that in circumstantial evidence each essential link in the chain of circumstances necessary to establish the guilty of the accused must be proved to such a degree of certainty as to convince the jury beyond a reasonable doubt. *Webster v. Com.*, 5 Mass., 317-318. This rule is necessary for the protection of the innocent, and should not be infringed upon nor in the least degree abated. The instruction in question was calculated to, and no doubt did, mislead the jury, and for that reason the judgment must be reversed.

The third instruction is also objectionable. In a criminal case, on a plea of not guilty, the court cannot assume that any fact necessary to establish the guilt of the accused has been proved, and so relieve the jury from its consideration. The evidence is to be submitted to the jury, and they are to say from the testimony before them what facts are proved, and what not proved. Even where there is no conflict in the testimony, the jury are the judges of the credibility of the witnesses, and may entirely discredit such testimony as to them may seem unworthy of belief. The court therefore erred in giving this instruction; but as no exception was taken, it will not form the basis of proceedings in error.

8d. The plaintiff testifies as a witness in his own behalf very fully, and denied making the alleged confessions. He did not, however, deny that he had committed the offense with which he was charged. The district attorney, in his argument to the jury, commented upon this omission, and this is now assigned for error. This question was before this court in *Comstock v. State*, 14 Neb., 205, and it was held that where a prisoner testifies in his own behalf, and fails to controvert what has been said by witnesses against him concerning a fact within his own personal knowledge, it is in the nature of an admission of the truth of such fact. The failure to controvert such fact may no doubt be open to explanation. The general rule is that if the accused testifies as a witness he is to be treated as any other witness. *Boyle v. State*, 5 N. E. Rep., 203. *Thomas v. State*, 2 Id., 808. *Com. v. Nichols*, 114 Mass., 285. *State v. Ober*, 52 N. H., 459; S. C. 13 Am., 88. *Connors v. People*, 50 N. Y., 240. There was no error, therefore, in the comments of the district attorney.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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| 20 | 500 |
| 20 | 681 |
| 20 | 500 |
| 33 | 273 |
| 20 | 500 |
| 28 | 378 |
| 20 | 500 |
| 36 | 433 |
| 20 | 500 |
| 40 | 571 |
| 41 | 689 |
| 20 | 500 |
| 45 | 661 |
| 20 | 500 |
| 148 | 648 |
| 20 | 500 |
| 53 | 25 |
| 54 | 14 |
| 20 | 500 |
| 59 | 89 |

STUDEBAKER BROTHERS' MANUFACTURING CO., APPELLANT, V. THOMAS W. MCCARGUR, APPELLEE.

1. **Mortgage: ASSIGNMENT OF NOTE.** The assignment of one of a series of notes secured by mortgage, without any accompanying transfer of the mortgage, is an assignment *pro tanto* of the mortgage.
2. —: **FORECLOSURE OF PORTION OF SECURITY.** Where there are several notes secured by mortgage, the holders are entitled

to share equally in the common fund, and a foreclosure by a holder of a portion of the notes, without making the other holders parties, will not bar the right of such parties to bring an action of foreclosure.

3. ———: LIMITATION. An action to foreclose a mortgage of real estate may be brought at any time within ten years after the cause of action accrues.

APPEAL from the district court of Madison county.
Heard below before CRAWFORD, J.

Robertson & Campbell, for appellant.

H. C. Brome, for appellee.

MAXWELL, CH. J.

On the 6th day of March, 1874, J. D. Brasel and David Gilmer executed a mortgage upon the premises in controversy "in favor of one J. D. Hite; said mortgage being given to secure four promissory notes of even date therewith, executed by Brasel & Gilmer in favor of said Hite; said notes being described in the mortgage as follows:

| | | | |
|------------------|----------|------------|---------|
| One for \$93.00, | due | March 6th, | 1875 |
| " | 100.00 | " | " 1876 |
| " | \$100.00 | " | " 1877 |
| " | \$200.00 | " | " 1878. |

"All of said notes bearing interest at ten per cent per annum from date. July 12, 1875, J. D. Hite assigned this mortgage to one L. F. Taylor, the assignment, duly acknowledged, being written on the back of the mortgage. December 1st, 1875, L. F. Taylor transferred to Aultman, Miller & Co. the two \$100 notes mentioned, one falling due March 6th, 1876, and one falling due March 6th, 1877, and at the same time delivered to them the mortgage assigned to him by Hite, having first written thereon the following words:

“ ‘NORFOLK, NEB., Dec. 1st, 1875.

“ ‘I hereby assign all my right, title, and interest to the within mortgage to Aultman, Miller & Co., of Akron, Ohio.
L. F. TAYLOR.’

“None of these assignments appear to have been recorded until March 18th, 1881, when both were recorded. March 28d, 1878, Aultman, Miller & Co. commenced foreclosure proceedings upon the two one hundred dollar notes assigned to them, and the mortgage in question. A decree of foreclosure was rendered, the premises sold thereunder, Aultman, Miller & Co. being the purchasers, receiving sheriff's deed in November, 1880.

“April 4th, 1883, Aultman, Miller & Co. quit-claimed to the defendant McCargur. McCargur is now in possession of the premises, having received the same from his grantor, Aultman, Miller & Co., who obtained possession November, 1880.

“The regularity of the foreclosure proceedings is not questioned, except that Studebaker Bros.' Manufacturing Co. were not made parties, and had no notice of the pendency of the action. Studebaker Bros. now own the \$98 note, and seek in this action to foreclose the mortgage, claiming the same as a security to said note, upon which they now seek to realize.

“They have possession of the note, which is endorsed as follows:

“ ‘JULY 12th, 1875.

“ ‘Pay to L. F. Taylor or order.

“ ‘J. D. HITE.’

“Underneath this is the blank endorsement, ‘L. F. TAYLOR.’

“This ninety-eight dollar note became due by its terms March 6th, 1875.

“There is no allegation in the pleadings or evidence in the record as to when Studebaker Bros. Manufacturing Co. be-

came the owner of it, except the endorsement above referred to.

"Aultman, Miller & Co. and the defendant, McCargur, had no knowledge of the whereabouts of said note, of its existence, or as to whether it had been paid or not, until long after the foreclosure proceedings instituted by Aultman, Miller & Co., had been finally determined, except the statement that such note had been given, contained in the mortgage itself.

"Studebaker Bros. Manufacturing Co., plaintiffs herein, have no written assignment of said mortgage nor any evidence of any claim or interest, except the present possession of the ninety-eight dollar note.

"The several questions presented by the above statement of facts are properly raised by the pleadings in the case, and defendant McCargur by his answer also pleads, as against plaintiff's claim, the statute of limitations."

The action was commenced July 30th, 1884.

In those states where it is held that a mortgage is a mere lien for the security of a debt, the assignment of one of the notes by itself, without any accompanying transfer of the mortgage, is an assignment *pro tanto* of the mortgage. Each assignee is, through the mortgage, charged with notice of the equitable interests of all the other assignees. The holder of a part of the notes with a formal assignment of the mortgage acquires no precedence from the fact that he is holding the mortgage. *Walker v. Schreiber*, 47 Iowa, 529. *Sargent v. Howe*, 21 Ill., 148. *Hough v. Osborne*, 7 Ind., 140. *Anderson v. Baumgartner*, 27 Mo., 80. *Cullom v. Erwin*, 4 Ala., 452. *Nelson v. Dunn*, 15 Ala., 501. *Henderson v. Herrod*, 10 Sm. and M., 631. *Gwathneys v. Ragland*, 1 Rand., 466. *Phelan v. Olney*, 6 Cal., 478. *Stevenson v. Black, Saxt.*, 338. *Keyes v. Wood*, 21 Vt., 381. *Belding v. Manly*, 21 Vt., 550. 3 Pom. Eq., § 1202.

In some of the states it is held that the assignment of each note, being *pro tanto* an assignment of the mortgage,

that therefore the holders of the successive notes are to be considered in the situation of the holders of successive mortgages upon the same land, their equities among themselves and their rights to enforce the common security not being equal, and the notes not to be paid in the order in which they become due.

In the absence of any stipulation to the contrary, it would seem but justice that all notes given for the same debt and secured by the same lien should at least share *pro rata* in the distribution of the common fund. This we deem the more just and equitable rule, and adopt the same. The court, therefore, erred in rendering judgment for the defendant.

2. An action to foreclose a mortgage on real estate may be brought at any time within ten years after the cause of action accrues.

The judgment of the district court is reversed and a decree of foreclosure and sale will be entered in this court.

DECREE ACCORDINGLY.

THE other judges concur.

AMOS WHITELEY, PLAINTIFF IN ERROR, v. ED. F. DAVIS,
DEFENDANT IN ERROR.

Final Order. An order overruling a motion to vacate an order of arrest is not a final order, and cannot be reversed on error until after judgment.

ERROR to the district court for Richardson county. Tried below before MITCHELL, J., sitting for BROADY, J.

Frank Martin, for plaintiff in error.

E. W. Thomas and *A. Schoenheit*, for defendant in error.

REESE, J.

This was a civil action commenced in the county court of Richardson county. Some time after the commencement of the action plaintiff filed an affidavit to procure the arrest of defendant. The order of arrest was issued and defendant was taken into custody. Afterwards he applied to the court to vacate the order of arrest. On a hearing the motion to vacate was overruled. Defendant then took error to the district court, and on a hearing there, upon the record which was before the county court, the decision of that court was reversed and defendant discharged. Plaintiff brings error to this court.

The record shows affirmatively that at the time of the institution of the proceedings in error by which the cause was removed to the district court from the county court, no final judgment or order had been rendered in the cause. It appears that on the 14th day of May, 1885, the motion to vacate the order of arrest was overruled by the county court. The cause was continued to the June term of said court. On the 26th day of the same month, and before the term of the county court to which the cause was adjourned, the proceedings in error were instituted in the district court.

We can see no difference in principle between this case and that of *Wilson v. Shepherd*, 15 Neb., 15. In that cause it was held that an order overruling a motion to discharge an attachment was not a final order. If not, it is not subject to review by proceedings in error until after judgment. The same reasoning adopted in that case is applicable to this. In writing the opinion of the court, Judge MAXWELL says: "But where the court overrules the motion—in effect holds that the showing made by the defendant is not sufficient to entitle him to a dissolution—the order is not final. It is still subject to review by the court up to the time of rendering the final judgment.

"The owner of the attached property may have the same released at any time by giving the undertaking required by section 206 of the code, and the giving of such undertaking will not prevent him from afterwards moving to discharge the attachment." Citing *Hilton v. Ross*, 9 Neb., 406.

The undertaking provided for by section 206 is to the effect that the attached property or its appraised value in money shall be forthcoming to answer the judgment.

Section 16 of chapter 20, Compiled Statutes, provides that when the amount sued for exceeds the jurisdiction of a justice of the peace the proceedings shall be the same, as near as may be, as in the district court.

Section 164 of the civil code, provides that bail may be given by a defendant who has been arrested at any time before judgment. The condition of the undertaking must be that if judgment be rendered against him he will render himself amenable to the process of the court. For aught that appears by the record, this undertaking may have been given by the defendant after the order complained of and before judgment. Again, it may be that upon the final trial of the cause, judgment was rendered in favor of defendant upon the merits of the cause. If so, that of itself would require a vacation of the order of arrest, and there would be nothing for this court to review upon the application of defendant. The order complained of not being a final order, the district court had no jurisdiction to review it. Neither has this court any authority so to do.

The proceedings in error in this court and to the district court must be dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JOHN F. NYCE, PLAINTIFF IN ERROR, v. OLIVER B.
SHAFFER, DEFENDANT IN ERROR.

1. **Bill of Exceptions.** By section 311 of the civil code the time within which a bill of exceptions is to be prepared begins to run from the final adjournment of the district court. A motion to quash such bill because not reduced to writing within the time required by law will be overruled unless the date of the adjournment of the district court is shown by the record.
2. **Trial.** Questions of fact are for the jury, and a verdict or finding by them on a question of fact where the testimony is conflicting will not be reviewed.
3. **Instructions: EXCEPTIONS.** Objections to instructions to a trial jury will not be noticed by the supreme court unless the attention of the trial court is first called to them by the proper exceptions at the time the instructions were given. *Warrick v. Rounds*, 17 Neb., 412.
4. ———: **OBJECTIONS.** Instructions asked and refused, or objected to, must be specifically pointed out in some way in the motion for a new trial. *O. & E. V. R. E. Co. v. Walker*, Id., 432.

ERROR to the district court for Hall county. Tried below before POST, J.

L. J. Capps, for plaintiff in error.

R. A. Butty, for defendant in error.

REESE, J.

A motion was made to quash the bill of exceptions in this case for the reason that the same was not reduced to writing within the time required by law.

The judgment was rendered Feb'y 18th, 1884, and the bill of exceptions was presented to counsel for defendant in error June 21st of the same year. It was subsequently allowed and signed by the judge before whom the cause

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| 20 | 507 |
| 22 | 651 |
| 24 | 308 |
| 20 | 507 |
| 26 | 548 |
| 20 | 507 |
| 30 | 125 |
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| 20 | 507 |
| 34 | 660 |
| 35 | 702 |
| 20 | 507 |
| 36 | 642 |
| 20 | 507 |
| 42 | 345 |
| 20 | 507 |
| 45 | 880 |
| 20 | 507 |
| 47 | 318 |
| 20 | 507 |
| 58 | 538 |

was tried, but the date of the allowance and signing does not appear. Neither does the record anywhere show at what time the court adjourned *sine die*.

Section 811 of the civil code provides that the bill of exceptions must be reduced to writing "within fifteen days, or in such time as the court may direct, not exceeding forty days from the adjournment of the court *sine die*," etc.

As we have no means of knowing when the adjournment did occur, we must presume that the bill was signed within the time fixed by the statute. The motion is therefore overruled.

The cause was submitted generally upon the brief of plaintiff in error, defendant in error having failed to present one. The action was a replevin suit instituted by defendant in error for the possession of certain personal property levied upon by plaintiff in error, a constable, as the property of one Abram Dunkle by virtue of a certain writ of attachment against him. The answer denied the ownership or right of possession of defendant in error, set out his official character, the issuance and delivery to him of the writ, the fact of the levy upon the property as that of Dunkle, and alleged that he was the owner, jointly with another, of part of the property replevied, and was the sole owner of the remainder, and that therefore the levy was rightful, and he (plaintiff in error) was entitled to the possession of the property in dispute. A trial was had which resulted in a verdict and judgment in favor of defendant in error. Plaintiff in error, who was defendant below, brings the cause to this court by proceedings in error for review.

It is claimed that the testimony shows that a part of the property—some hogs—were held by Dunkle as the bailee of one Jackson, or at most a joint owner with him, and that no title could vest in Dunkle until after a division of the property; and that therefore he could convey no title to defendant in error. It must be sufficient here to say

 Coakley v. Christie.

that this question of the ownership of Dunkle, as well as of his sale to defendant in error, were fully submitted to the jury, and that the evidence in favor of the contention of defendant in error was sufficient to sustain the verdict.

Objection is made to one instruction given by the court to the jury, but as no exception was taken to it when given, nor was it assigned for error in the motion for a new trial, it will not be noticed here. *Scofield v. Brown*, 7 Neb., 222. *O. & R. V. R. R. Co. v. Walker*, 17 Id., 432. *Warrick v. Rounds*, Id., 412.

No error appearing of record, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

KATE COAKLEY, PLAINTIFF IN ERROR, v. CHRISTIE &
SON, DEFENDANTS IN ERROR.

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| 20 | 509 |
| 39 | 668 |
| 20 | 509 |
| 50 | 514 |

Negotiable Instruments: PROMISSORY NOTE: BONA FIDE PURCHASER: BURDEN OF PROOF. One C. made a negotiable promissory note to H. for the purchase of a piano. The note was endorsed and transferred to plaintiffs. *Held*, That C. could not prove that the piano did not comply with a warranty alleged to have been made by H., or that after the execution of the note the contract of purchase was agreed to be rescinded, without introducing testimony tending to show that the plaintiffs had not purchased the note in good faith before maturity.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

J. L. Caldwell, for plaintiff in error.

F. M. Hall and W. S. Hamilton, for defendant in error.

REESE, J.

This was an action on a promissory note by an indorsee. The answer alleges that the note was delivered conditionally to the payee, the condition being that a certain piano purchased of the payee by plaintiff in error should be a new one of first-class quality, and should upon trial prove satisfactory to plaintiff in error, or, in the event of its failure, it should be returned and the notes surrendered. It is further alleged that the instrument was not what it was represented to be, that notice of the fact was given to Hohmann, the payee of the note, and that he agreed to take it away and surrender the notes, but that afterwards he endorsed them (without recourse) to defendant in error. That in the transaction Hohmann acted as agent for defendant in error. That the instrument was not as warranted. That the contract was rescinded, and that the consideration for which the notes were given had wholly failed.

There was a jury trial; plaintiff in error was called as a witness. The abstract contains but one question propounded to the witness, which was as follows:

Q. "Did you have a contract with S. B. Hohmann for the purchase of a piano about August 22d, 1884, and if so, state what conversation you had with him in relation to the purchase of the piano?"

This question was objected to "for the reason that it did not lay the proper foundation for entering into the consideration of the question." The objection was sustained. Plaintiff in error, by her attorney, then made the following offer of testimony:

"I offer to show by Mrs. Coakley, the witness upon the stand, that at the time of the delivery of the note, it was understood that the delivery was conditioned upon the instrument complying with the warranty, being new and

first-class in quality. That after an examination she discovered that the piano was an old one, inferior in tone, and second-hand, and of little value. That she notified Hohmann, and he then agreed to return the notes and take away the piano; and, that after that time he transferred the notes." This was also objected to, and the offered testimony was excluded. The jury, by direction of the court, returned a verdict in favor of defendant in error. From an order overruling a motion for a new trial, defendant below brings error to this court, assigning as error the ruling of the court on the testimony offered. The offer made contains no reference to the allegation in the answer, that in the sale of the piano, and taking of the notes, Hohmann acted as the agent of defendant in error. In that case, there would have been no question of *bona fides* in the purchase of the notes: the principal being bound by the acts of his agent. Neither does the answer contain any allegation of fraud on the part of Hohmann in procuring the notes. The offer, therefore, was nothing more than to prove that the instrument did not comply with the terms of a warranty made by Hohmann, and that he agreed to return the notes, but failed to do so, and transferred them to defendant in error. There being no tender of proof that defendant in error was not an innocent purchaser of the notes before value, the ruling of the district court was correct. *Organ Co. v. Boyle*, 10 Neb., 409. *Smith v. Bank*, 9 Id., 31.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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| 20 | 512 |
| 24 | 381 |
| 30 | 519 |
| 25 | 796 |
| 20 | 512 |
| 62 | 742 |

HENRY J. SIMPSON ET AL., PLAINTIFF IN ERROR, v.
CHRISTOPHER ARMSTRONG, DEFENDANT IN ERROR.

Trial: NEW TRIAL. Immaterial and irrelevant testimony admitted over defendant's objection, and which may have a tendency to mislead the jury, is good ground for a new trial. *Harrison v. Baker*, 15 Neb., 43.

ERROR to the district court for Brown county. Tried below before TIFFANY, J.

E. F. Gray, for plaintiffs in error.

Holmes & White, for defendant in error.

REESE, J.

This was an action against the sheriff of Brown county for the conversion of personal property.

On the 8th of May, 1884, defendant in error purchased a stock of goods from one George R. Reed, paying therefor the sum of \$900 in cash. He took possession and left the store in charge of a clerk, and returned to his residence in Clay county. On the 24th day of the same month plaintiff in error levied on the goods as the property of Reed, and took them from the possession of defendant in error, who brought suit for their value and recovered a judgment. The sheriff, as plaintiff in error, brings the case to this court by proceedings in error.

The defense relied upon by plaintiff in error was that the alleged sale of the goods to defendant in error by Reed was a fraudulent transaction and done for the purpose of defrauding the creditors of Reed.

As a new trial must be had we refrain from expressing any opinion upon the merits of the case or the *bona fides* of the parties to the transaction, but will confine ourselves to the one or two propositions which it is deemed necessary to notice.

On the trial the plaintiff in the action, defendant in error here, took the witness stand and testified to the purchase of the goods from Reed, the payment of the consideration, etc., and introduced certain documentary evidence, and then rested his case. Plaintiff in error introduced, oral testimony by which he sought to prove the indebtedness of Reed to a considerable amount, and also the alleged fraudulent character of the transaction. He also introduced some documentary evidence for the purpose of showing his authority to levy on the property of Reed.

Defendant in error then introduced L. K. Adler, Esq. an attorney residing in Ainsworth, who testified in substance, that on the 8th day of May, 1884, he prepared the documents by which the property was transferred to defendant in error, and also a lease of the building from one McCoid to defendant in error, and stated that at the time he knew nothing about the indebtedness of Reed. His testimony following was as follows: "Question. State what, if anything, you learned about the indebtedness of Reed soon after the conveyance, and what occasioned your seeking the information? Answer. Some time after the sale Mr. Reed came into my office and requested me to write to his creditors and ascertain the amount of his indebtedness, and gave me a list of them. It was from two to five days after the sale that Reed employed me to write to his creditors, as near as I can recollect."

This testimony was admitted over the objections and exceptions of plaintiff in error. In this we think the court erred. The only theory upon which testimony of the kind is admissible, is that it becomes a part of the *res gestæ*, being so nearly connected therewith as to be spontaneous and unpremeditated, and therefore free from sinister motives; thus giving a reliable explanation of the principal transaction—the subject of the inquiry. Applying this rule to the testimony complained of, we cannot hold it to have been properly admitted. It is true, as claimed by defend-

ant in error, that to render declarations admissible, it is not always necessary that they should be precisely concurrent in point of time with the principal transaction; but we know of no rule which will extend the time from two to five days, under the circumstances shown in this case. Furthermore, the facts testified to could have no connection with the merits or demerits of the sale of the property. They do not tend to show either good or bad faith on the part of Reed in making the sale. They have no reference whatever to the acts or motives of defendant in error. Reed knew who his creditors were, for he furnished a list of them to the witness. Whether he paid any of them after the time testified to does not appear. Whether his motives were good or bad is not material, as no light could be obtained from a knowledge of the fact. Whatever his purpose, his conduct may have been the result of an afterthought on his part. The testimony was of a character which might be prejudicial to plaintiff in error. The very fact of its admission was a virtual representation to the jury that it was material and they would treat it as such. They would probably look upon it as proof that at the time of the sale he was acting in good faith, and afterwards sought to find his creditors in order that he might pay them in pursuance of his purpose at the time of the transfer. The sale on his part, and the purchase on the part of defendant in error, may have been in the best of faith, yet the fact that he sought to have an attorney write to his creditors from two to five days afterwards would not tend in any degree to prove it. The admission of the testimony was therefore erroneous. *Harrison v. Baker* 15 Neb., 43.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

GEORGE E. PARKS, PLAINTIFF IN ERROR, V. THE
STATE OF NEBRASKA, DEFENDANT IN ERROR.

Criminal Law: EVIDENCE. The holding of this court in the case of *Stevens v. The State*, 19 Neb., 647, to the effect that upon the trial of a criminal case which is being prosecuted on an information, it is error on the part of the court to permit, over the objection of the accused, a witness to be sworn on the part of the state whose name had not been endorsed on the information before the trial, adhered to.

ERROR to the district court for Dodge county. Tried below before POST, J.

C. Hollenbeck and *Robert J. Stinson*, for plaintiff in error.

William Leese, Attorney General, *William Marshall*, District Attorney, and *J. E. Frick*, for defendant in error.

COBB, J.

The plaintiff in error was tried and convicted by the district court of Dodge county, upon an information for subornation of perjury. He brings the cause to this court on error. There are fifteen errors assigned; but as it was decided at the consultation that there must be a new trial upon the one arising first in the order of sequence, no good purpose would be subserved by setting them out at length here. I copy the 5th and 6th assignments of error.

"5. The court erred in allowing, or permitting one John McNaught, a witnesses for the state, to testify, his name not appearing on the back of the information, as required by law.

"6. Accident and surprise, which ordinary prudence could not have guarded against. Such surprise consisted in the introduction of witnesses by the state, whose names were not endorsed on the information as required by law."

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The chapter of our statute, Chap. LIV., criminal code, by its first section, confers upon the district court the power to hear, try, and determine prosecutions upon information for crimes, misdemeanors, and offenses, the same as they may in like case upon prosecutions upon indictments. Section 2 of the act (579 of the criminal code), provides as follows:

"All informations shall be filed during the term in the court having jurisdiction of the offense specified therein by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto, and endorse thereon the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case as the court may by rule or otherwise prescribe, he shall endorse thereon the names of such other witnesses as shall then be known to him."

It appears from an inspection of a certified copy of the information and the bill of exceptions, that several witnesses, especially John McNaught, the principal witness, were sworn and examined on the part of the state, whose names were not at any time endorsed or written on the back of the information. The defendant objected to the swearing of the witness McNaught, and saved his exception.

In the case of *Stevens v. The State*, 19 Neb., 648, this point was squarely presented, and upon due consideration it was held as contended for by the plaintiff in error. Counsel now present an able brief and argument, and earnestly urge the court to reverse its decision on this point.

As to the language of the statute, it cannot be doubted that the meaning given it by the court in the above case is the plain and natural one. Counsel refer to the case of *Ballard v. The State*, 19 Neb., 609, where it is held that, "In the trial of a criminal prosecution wherein a defendant is arraigned upon an indictment found by a grand

jury, the state is not precluded from the examination of witnesses whose names are not endorsed upon the indictment," and referring to the case of *Stevens v. The State*, ask, "What good reason can be assigned for so limiting his rights in this regard under the former mode, and so extending them under the latter mode of prosecution?" etc.

Now it seems to me that this enquiry would be far more cogent if addressed to the proper committee of the legislature, than when addressed to a court. Courts have but little to do with the policy of the laws, whatever might be the opinion of its members as individuals of their wisdom or expediency. The laws which they find on the statute books, it is the duty of the courts to apply, and in proper cases to construe. But when the meaning and intention of the legislature is clearly indicated by the language of the law, no construction is necessary. To return to the section before us. Can it be seriously questioned that it was the intention of the legislature to make it the duty of a prosecuting officer to endorse the names of the witnesses for the state in each case, upon the information before the trial? Is the language used susceptible of any other meaning? The ingenuity of counsel has not enabled them to suggest any other meaning.

The law providing for prosecutions by information is not yet two years old in this state. It is an innovation which had been often suggested before it was adopted. With its undoubted advantages, it has been objected to as placing too much power in the hands of the prosecutor. Probably foreseeing this objection, the framers of the law sought to throw around the rights of the accused, under this method of prosecution, every reasonable protection. Under the system of prosecution by indictment, the grand jury was, in a sense, the accuser of every person brought to trial for a crime. So here, where the services of a grand jury are dispensed with, while the responsibility of the

prosecution rests in some sense upon the shoulders of the prosecuting attorney, there is certainly some reason why there should be open to the accused some source of information as to the identity of the persons upon whose oath his conviction and punishment is about to be claimed at the bar of justice.

It is claimed by counsel on either side, and is doubtless true, that the section of our statute now under consideration was at least substantially adopted from the statute of Michigan. That statute had been applied and construed, so far as its construction was necessary, by the court of last resort of the latter state, before its adoption by us. Accordingly, as has been often said in like cases, by this as well as other courts, we adopted the construction along with the statute.

The case of *People v. Hall*, 48 Mich., 482, was before the supreme court of that state in 1882, involving this question. I quote from the syllabus: "In a criminal prosecution the names of witnesses cannot, against objection, be added to the information without a showing that they were not known earlier and in time to give defendant notice in season to anticipate their presence before trial."

Again, but after the adoption of the law by us, the question came again before that court in the case of *People v. Quick*, 25 N. W. R., 302. In the opinion they say: "We have held on several occasions that the defendant has a right to know in advance of the trial what witnesses are to be produced against him, so far as then known, and to have any new witnesses endorsed on the information as soon as discovered."

In the light of these cases, I think the law can be administered so as to avoid the dangers so much deprecated by counsel. In cases where new witnesses become known to counsel, or are ascertained to be necessary after the information has been filed, with such witnesses endorsed thereon as were known to him at the time of filing, it is only neces-

Steinkraus v. Hurlbert.

sary that he make such a showing of the facts as will bring to the knowledge of the court that the prosecutor has acted in good faith and that the additional witnesses are necessary for the due presentation of the case.

In the case at bar the name of the witness, McNaught, must have been omitted by mere inadvertence, but no showing was made or attempted, and it seems to me that the judgment cannot be sustained without both overruling our own case and invading the province of the legislative branch of the government.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

HERMAN STEINKRAUS, PLAINTIFF IN ERROR, v. D. S.
HURLBERT ET AL., DEFENDANTS IN ERROR.

1. **Liquors: LICENSE: REMONSTRANCE.** Where a remonstrance against the issuing of license to a certain applicant is filed with the licensing board, in which it is alleged that the applicant "within the five or six months last past, during which time he has run a saloon in Plainview, has been guilty of gross violations of the law under which he now asks for license," it is the duty of such board to set a day and hear testimony to prove or disprove the charge, and render a decision thereon.
2. —: **HEARING IN DISTRICT COURT.** If the licensing board refuse to receive testimony in support of the remonstrance, the district court will remand the cause in order that such testimony may be taken and a decision rendered thereon.

ERROR to the district court for Pierce county. Tried below before TIFFANY, J.

E. P. Holmes, for plaintiff in error.

O. J. Frost, for defendant in error.

MAXWELL, CH. J.

The plaintiff presented a petition, duly signed, to the county commissioners of Pierce county for a licence to sell malt, spirituous and vinous liquors in Plainview in said county. Before the time set for the hearing of the petition, the defendant and others filed a remonstrance, duly signed, with said commissioners, protesting against the issuing of a license to the plaintiff, upon the ground that "the said Herman Steinkraus, within the five or six months last past, during which time he has run a saloon in Plainview, has been guilty of gross violations of the law under which he now asks for a license."

On the day set for the hearing of the remonstrance the commissioners "refused to permit any testimony to be introduced showing that said applicant, Herman Steinkraus, had been guilty of the violation of any of the provisions of the act relating to the sale of liquors contained in chapter 50 of the Compiled Statutes of Nebraska within the space of one year prior thereto, and instructed the clerk to issue license for the purpose aforesaid to the said Herman Steinkraus for the period of one year," etc.

The cause was taken on error to the district court, where the order of the commissioners was reversed and the cause remanded to them to hear testimony on the remonstrance.

Sec. 3 of chapter 50, Compiled Statutes, provides that "If there be any objection, protest or remonstrance, filed in the office where the application is made against the issuance of such license, the county board shall appoint a day for the hearing of said case, and if it shall be satisfactorily proven that the applicant for license has been guilty of the violation of any of the provisions of this

act for the space of one year, or if any former license shall have been revoked for any misdemeanor against the laws of this state, then the board shall refuse to issue such license."

Sec. 4 provides for the taking of testimony and the reducing of the same to writing, and in case either party appeal, the certifying of the same to the district court.

In the case at bar, however, the commissioners refused to hear testimony. While no doubt they could be compelled by mandamus to hear testimony in a case in order that the question of the applicant's violation of the law for a year previous to the filing of the application for license may be determined, and in order that either party may appeal, yet the failure to do so will not deprive the party of his right to object to such refusal by proceedings in error.

The design of the law is, that those who protest against the issuing of license for any of the causes named in the statute shall have an opportunity to present their evidence to establish their objections. The petition for license must set forth "that the applicant is a man of respectable character and standing." Those who remonstrate against the issuing of a license say in effect that he is not. This presents an issue which must be determined from the evidence. The reasons assigned against the issuing of a license are to be carefully weighed, and if upon all the testimony it appears that the applicant has been guilty of the violations of the law complained of, a license should be refused. In other words, the remonstrants have a right to insist that the saloon keeper who has furnished intoxicating liquor to any "minor, apprentice or servant under twenty-one years of age," or to an "Indian, insane person, or idiot, or habitual drunkard," or "on the day of any special or general election, or on Sunday, during the preceding year," shall be prohibited from committing like offenses during the ensuing year. The welfare of the

community demands that the man who for the past year has deliberately violated the law by the unauthorized sale of intoxicating drinks shall not be given new power to continue such traffic. It was the duty of the county commissioners, therefore, to have heard the testimony offered by the persons filing the "remonstrance," and if any violations of the law by the petitioners for the preceding year were proved, to refuse a license to him. There is no provision for taking testimony in the district court. It is the duty of the licensing board to take such testimony. Then in case either party is aggrieved an appeal may be taken to the district court. The court below, therefore, did not err in reversing the cause and remanding it to the board of county commissioners to take testimony and act thereon. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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STATE OF NEBRASKA, EX REL. CITY OF YORK, v. H.
A. BABCOCK, AUDITOR OF PUBLIC ACCOUNTS.

1. **Cities of the Second Class: BONDS FOR WATER WORKS.**
Section 69 of the act relating to cities of the second class, authorizes the submission to the electors of such city, by a resolution of the city council, of a proposition to issue the bonds of the city for water works, and such submission need not be by ordinance.
2. **Taxes.** The right of a city council of a city of the second class to impose a tax for water works is limited to five mills on the dollar on the assessed valuation of such city, and bonds issued for water works, bearing interest in excess of such limitation, are unauthorized.

ORIGINAL application for mandamus.

J. F. Hale and Scott & Gilbert, for relator.

William Leese, Attorney General, for respondent.

MAXWELL, CH. J.

This cause is submitted to the court upon demurrer to the petition. The petition is as follows :

"The city of York, in the county of York, complains of H. A. Babcock, auditor of public accounts, and shows to the court—

"1st. That the relator, the city of York, is a municipal corporation duly organized under the laws of Nebraska for the government of cities of over one thousand inhabitants, and has been such organized city for more than one year last past.

"2d. That the respondent, H. A. Babcock, is the auditor of public accounts, charged with the duty of registration of city and village bonds.

"3d. That on the 1st day of March, 1886, the assessed valuation of the city of York was more than three hundred thousand dollars, to-wit: \$335,000.

"That on the 1st day of March, 1886, at a regular meeting of the city council of said city, a petition was presented to the said council, praying that it submit to the voters of said city, at the general city election to be held on the 6th day of April, 1886, a proposition to issue the bonds of said city in the sum of \$30,000 for the purpose of erecting and maintaining a system of water-works in said city ; and afterward, at an adjourned regular meeting of said council, a motion was unanimously adopted submitting said proposition to the electors of said city, to be voted upon by them at the general election to be held on said 6th day of April, 1886 ; and the notice of election and proclamation were duly issued and published according to law, the said proclamation setting forth in full the proposition so submit-

ted, a copy of which, with all the proceedings of the council up to, and including the time of the issuance of the bonds in accordance with said proclamation, are hereto attached and (made) a part of petition, marked 'Exhibit A.'

"That at the general city election held in said city, on the said 6th day of April, 1886, said proposition was voted upon by the electors of said city, and the returns of said election were duly canvassed by the mayor and council; at which election there were found to be cast 470 votes, of which number there were found to be cast in favor of said proposition 242 votes—a majority of all the votes cast thereat. The result was thereupon, by the mayor and council of said city, declared to be that said proposition was adopted; and the proposition and the result were entered upon the records of the city.

"That on the 26th day of May, 1886, the mayor and clerk, by order of the city council, were ordered to cause to be issued the bonds of said city in the sum of \$30,000, in denominations of \$500 each, with coupons attached to bear interest at the rate of six per cent. per annum, payable semi-annually at the fiscal agency of the state of Nebraska in the city of New York. A copy of the proceedings of the city council authorizing the issuance of said bonds is attached to said exhibit 'A,' and is made a part of this petition.

"That in pursuance of said proposition and the facts above set forth, the mayor and clerk, on the 15th day of June, 1886, proceeded to, and did sign and execute said bonds, and afterwards, and before the commencement of this action, presented the same to respondent as auditor of public accounts, under the provisions of an act to provide for the registration of city and village bonds, approved March 5, 1885, and requested that he certify upon said bonds that they have been regularly issued and registered in the office of the auditor of public accounts, and furnished to said auditor a transcript of all the proceedings, duly certified

under the hand of the city clerk of said city and the seal thereof, and offered to pay said auditor the legal fees therefor, but the registration of said bonds by the respondent was refused.

"That the said city has no indebtedness except its part of county and precinct bonds issued to aid in the construction of a railway through said county.

"That the said city has no means to construct said water-works system unless it can realize upon the bonds so as aforesaid issued, and it has made a contract for the sale of said bonds at a premium of \$701, provided the said bonds be registered and issued according to law.

"The relator further shows that so far as it is advised, the reason said respondent refuses to register said bonds, as he claims, is that the city council did not adopt an *ordinance* providing for the submission of the said proposition to the electors at the general election held in said city on said 6th day of April, 1886; but the relator contends that the law does not require the enactment of an ordinance, either to call a general election, or for the purpose of submitting the question of borrowing money to the electors at a general election, in cities of the second class of over one thousand inhabitants, to aid in the construction of water-works.

"Therefore relator prays that the court issue a peremptory writ of mandamus directed to H. A. Babcock, auditor of public accounts, commanding him forthwith to register and under his seal of office certify upon said bonds that they have been regularly and legally issued, and that they have been registered in the office of the auditor of public accounts in accordance with the provisions of law."

In the record of the proceedings of the city council the following appears in regard to the canvassing of the vote, declaring the result, and ordering the issuance of the bonds:

"On the 12th day of April, 1886, at a meeting of the city council, the following, among other proceedings, were had, to wit:

“ ‘ YORK, NEBR., April 12, 1886.

“ ‘ To the honorable council of the city of York :

“ ‘ GENTLEMEN: This meeting is called for the purpose of canvassing the vote cast at the last city election and allowing the officers-elect to qualify, so that the new council may organize for business.

“ ‘ Very respectfully,

“ ‘ W. M. KNAPP,

“ ‘ Mayor.’ ”

* * * * *

“ The whole number of votes cast, 470 ; of which there were cast FOR water bonds and tax, 242.

“ It therefore appearing that a majority of all the electors voted FOR the water bonds and tax, the same was duly declared carried.”

And afterwards, on the 26th day of May, 1886, at a meeting of the city council, the following resolution was adopted unanimously : “ Whereas, it appearing that a majority of the electors of the city at the general election held in said city on the 6th day of April, 1886, voted in favor of the proposition to issue the bonds of said city in the sum of thirty thousand (\$30,000) dollars for the purpose of defraying the expenses of erecting a system of water works for said city, and it appearing that the city council, at a meeting held for that purpose, declared that said proposition was duly carried. It is therefore hereby ordered that the mayor and clerk be and they are hereby authorized to cause to be issued sixty (60) bonds of said city of the denomination of five hundred (500) dollars each, with coupons attached, to bear interest at the rate and payable at the times specified in the notice and proclamation heretofore issued and published by order of the city council and voted upon by the people at the general election held in said city on April 6, 1886, said bonds to be dated June 15, 1886.”

There are two questions presented for consideration :

First, was the proposition properly submitted to the electors of the city of York? *Second*, if so, was the amount of tax to be levied thereunder within the limit fixed by the statute?

Section 69, chap. 14, Comp. Stat., provides that: "In addition to the powers hereinbefore granted cities and villages under the provisions of this chapter, each city and village may enact ordinances or by-laws for the following purposes: To levy taxes for general revenue purposes, etc.; to provide for grading streets, construction of bridges, sewers, etc.; to raise revenue by license tax on occupations, etc.; to regulate the traffic in liquors, etc.; to make all such ordinances, by-laws, rules, regulations, and resolutions not inconsistent with the laws of the state, as may be expedient, in addition to the special powers in this chapter granted."

This twelfth subdivision in effect adds to the specific powers granted in the first part of this section, the authority to proceed in all proper cases by "rules, regulations, and resolutions." There are many cases where, from the temporary character of the matter involved, it would seem to be unnecessary to pass a formal ordinance, such as the submission to the electors of a proposition for the issuing of water bonds. In such case the proposition, unless adopted by a majority vote, would possess no validity whatever. It is simply what its name implies, a proposition, and unless adopted by a majority vote would fail.

In the case at bar the proposition is conceded to be and is in proper form. It evidently passed the council by unanimous vote. It was treated by the electors of the city as a valid proposition and adopted by a majority vote. The city council thereafter assembled, in pursuance of law, and canvassed the vote, and declared the result of the election, and afterwards, on the 26th day of May, 1886, the city council, by unanimous vote, ordered the issuing of the bonds. This body was charged with the duty of submitting the proposition, canvassing the vote, declaring the

result, and if the proposition was carried, issuing the bonds. This power appears to have been duly exercised by that body in pursuance of the statute, and a mere irregularity in their proceedings, even had it been shown, would not affect the validity of their acts. We hold, therefore, that the proposition to issue the bonds of York city was properly submitted to the electors thereof.

2d. The second question is a more serious one. The assessed valuation of the city of York was the sum of \$335,000. The vote authorized the issue of, and it is now sought to compel the defendant to certify, bonds to the amount of thirty thousand dollars, bearing interest at the rate of six per centum per annum. The statute limits the levy "of tax for water works to an amount not exceeding five mills on the dollar in any one year on all the property within such city or village, as shown and valued upon the assessment rolls." This is a limitation upon the power of the city council beyond which they have no authority to issue bonds. *Hamlin v. Meadville*, 6 Neb., 227. *Reineman v. C. C. & B. H. R. R. Co.*, 7 Neb., 314. This point is not insisted on by the defendant, but the fact is apparent upon the face of the record, and is thus brought to the attention of the court. It is apparent that the issue is in excess of the power of the city council, and that the defendant was justified in refusing to certify the same.

The writ must therefore be denied.

WRIT DENIED.

THE other judges concur.

LAURA E. POWERS, APPELLEE, v. THOMAS POWERS, AP-
PELLANT.

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1. **Petition: SUFFICIENCY.** A petition, when assailed after a decree, will be held sufficient if the facts stated constitute a cause of action, even though informally and indefinitely stated. Such defects must be corrected by motion before answer or demurrer, or they will be deemed to be waived.
2. **Appeal: FINDING SUSTAINED.** In a case brought to the supreme court on appeal, where no question of law is involved, and the testimony is conflicting and pretty evenly balanced, the finding of the court will not be disturbed. *Callahan v. Callahan*, 7 Neb., 38.
3. **Evidence examined and Held,** to support the finding of the district court.

APPEAL from the district court of Saline county.

Harwood, Ames & Kelly, and *Dilworth, Smith, & Dilworth*, for appellant.

Daves, Foss & Stephens, for appellee.

REESE, J.

This is an appeal from Saline county. The action was brought to obtain a divorce, alimony, and the custody of a minor child. A decree for divorce, the custody of the child, \$2,500 alimony, and \$150 per year for the support of the minor child, was rendered. Defendant appeals from the decree granting the divorce and custody of the child to plaintiff, and plaintiff complains that the allowance of alimony is too small.

Two grounds for divorce are alleged in the petition. Habitual drunkenness and extreme cruelty. The finding of the district court was in favor of plaintiff upon the charge of extreme cruelty, but not as to habitual drunkenness.

Objection is made to the petition as not being sufficiently explicit in the allegations of extreme cruelty. These allegations are as follows:

"4th. That the defendant, wholly regardless of his duties as a husband, has for the last five years treated the plaintiff with extreme cruelty without any provocation; that for more than five years preceding the 22d of March, 1884, he was guilty of extreme cruelty to her; that on many occasions he frequently struck her—he would use abusive, vulgar, and opprobrious epithets of and to her; that he accused her of being unchaste and untrue to him, threatened her life and put her in fear of doing her bodily harm; that when lady friends were visiting her he was sullen, cross, and insolent; that his conduct in this respect became so notorious and unbearable that her friends ceased to visit her; that on the 22d day of March, 1884, he was guilty of extreme cruelty to her. In this, he cursed and swore at her; called her vulgar names; in this, 'you damned old fool, you damned she devil, you damned bitch, you are too damned nice to live,' and other like language; that he was so vulgar, vicious, and insulting that she became frightened, and was afraid he would do her bodily harm; that anxiety of mind and mental anguish caused by the cruel treatment induced a nervous attack which prostrated her, and that she has ever since been under the care of a physician; that many times in the last five years, on occasions of his unkindness and ill-treatment, she had been driven from home and been compelled to seek protection with friends, but she has been induced to return and live with him by his repeated and solemn promise that he would treat her kindly in the future; that in consequence of his violating his promises and continuing to treat her with unkindness and cruelty and ill-treatment, her health has been greatly impaired; that on the 22d of March, 1884, he ill-treated her as aforesaid, that she was obliged to leave home and seek a home with her parents for herself and child;

that at that time she was and has been suffering with sickness caused by his ill-treatment, which caused her to be very sick; that she has been and is now under the care of a physician; that he is a man of coarse and vulgar habits, of high temper and revengeful disposition; that he has frequently, in the last five years, and more especially in the last two years, cursed and swore at her; that at such times he would vent his spite upon the little boy by kicking, striking, and severely whipping him; he would teach the little boy to swear at her and sit by and laugh at her while the boy would do it, and if she would try to stop the boy, he would curse and swear at her and abuse her in other ways so she was in constant fear of her life, and would threaten to whip the boy harder if she said anything. That on the 22d of March, 1884, she took said boy to her father's, a suitable place, where he can be taught proper manners, and have a good moral education; that he would come and intrude upon her at her father's house and demand that she return and live with him and bring the boy with her, and threatened her life if she did not, and that he would commit some terrible crime, shoot her parents, or steal the child and remove him out of the jurisdiction of the court. That on the 3d of November, 1884, he did come and steal and forcibly carry the boy off, and sent the following telegram:

“ ‘FRIEND, NEB., Nov. 3d, 1884.

“ ‘*Mrs. T. Powers, Crete, Nebraska:*

“ ‘You might as well give up. I have my boy,’ etc.”

While the petition was probably assailable by a motion for a more specific statement, yet we think it sufficient when attacked after decree. It is alleged “that on many occasions he * * struck her; he would use obscene, vulgar and opprobrious epithets of and to her; that he accused her of being unchaste and untrue to him, threatened her life and put her in fear of doing her bodily harm,” etc.

A petition may state a cause of action and yet be very informal. In Maxwell's "Pleading and Practice," 1885 Ed., page 118, it is said: "Mere defects of form, indefiniteness in the allegations of the petition, are not grounds of demurrer. These defects and others, if they exist, must be corrected by motion," etc.

The principal contention of defendant is that the decree is not supported by sufficient evidence: that, considering all the proofs, the finding should have been in his favor.

We have carefully read all the evidence in the case, and while we must concede that if this hearing was in an original and not appellate capacity, we might incline strongly to a different conclusion from that reached by the trial court, yet we cannot hold that that decision was wrong. And it is quite possible that, had we had the opportunity of the judge who tried the case, of an observation of the deportment of the witnesses and of those other aids which are supposed to shed light upon a cause on trial directly before the court, we might have arrived at the same conclusion reached by him.

In the capacity in which this court now sits we must apply the fundamental and well-established rules applicable to such a capacity—that the decision is presumed to be correct and that wherein the testimony is conflicting thereon will be sustained unless clearly wrong. *Callahan v. Callahan*, 7 Neb., 41.

The testimony is quite voluminous and is very contradictory. In fact we do not remember of having perused a record in which appears a more sharp and unreasonable conflict of the statements of the witnesses. This occurs not only in the testimony of the interested parties, but in that of those who are supposed to be wholly disinterested and destitute of bias. It is a lamentable fact that the disposition to *help* the side calling the witnesses is (unconsciously, perhaps) shown by many. It is charged, and no doubt believed by some, that had it not been for the med-

dlesome interference of persons other than the parties to this unfortunate controversy, there would have been no trouble nor domestic discord, and the family which is now separated would have remained together. However much such interference is to be condemned by all right thinking people, yet this is a matter not submitted for decision by this nor the trial court. As the case is found and submitted, so it must be measured and weighed, upon its own merits and facts, as they exist, without reference to the cause.

As we have said, the testimony of the witnesses is irreconcilable, and for the purpose of this review, it only becomes necessary to examine the evidence produced by plaintiff and ascertain whether that, if believed by the trial court, is sufficient to sustain the decree. We quote from the testimony of plaintiff:

"We lived there" at Sutton "five years. He was drunk nearly all the time. He would come home very often and vomit on the floor. * * * He kept liquor in the house in a closet off of the sitting room. For the last three years he nearly all the time had a bottle of whisky at night under his pillow or under the bed. Sometimes I would empty it out and he would not know the difference, thinking he had drank it up. I told him it was mortifying to me to meet him always coming out of a saloon. He told me if I would let him have his liquor at home like other people, he would not go off to the saloon. I told him then he could bring it if he would only take it three times a day and not to excess. He would bring it home by the quart and the little boy would play keeping saloon for his papa, and I told him we could not bring him up that way. I told him that he could not bring it to the house any more, and he cursed and swore, and sometimes he would bring it and hide it. There was a half bushel of bottles that I had gathered up and put in the cellar when I came away that I had not destroyed. They were flat pint bottles and half-pint bottles. Mr. Powers had used the whiskey.

Just before I left he was drunk every hour of the day. For the last three months he seemed to be almost constantly drunk, with the exception of one time, about the first of January, when he gave me his last promise. He came home about nine o'clock, while I was undressing the baby to put him to bed, and he came in in a few minutes and commenced cursing me. I asked him why he did that; that I had said nothing to him. He cursed and said it was a pretty time for a person to find fault about his coming home late. I told him it was all right. He cursed so that the little boy cried. I told him it was too bad and that he ought not to curse before the child; if he wanted to curse me please to wait until I put Sammy to bed. He did. I went out into the room and he cursed me and called me names. 'You damned old hussy; you; you think I am asleep, you have been threatening to leave, now you have got to go. He said if I would go he would give me \$10,000, and said all I had to do was to get ready and go. I told him I would if he would give me the things to go with; I had no trunk. He said all I had to do was to go down town and buy one. He said I was nothing but a damned whore any way, that the sooner I went home the better it would please him. He had called me that before. * * * Our child is six years old. He was sick during the winter, in the month of January. My husband was drinking during the child's sickness. I wanted the doctor to come. He came, but my husband kept me out in the other room and talked to him. I wanted him to come in but he still had this spell on him. After that my sister-in law went away and baby was sick and I wanted him to get the doctor for him and he wouldn't.

* * Mr. Powers' conduct was very bad. One night I thought Sammy would die. Mr. Powers was drunk all the time. He came to the door and jerked it open and I told him I thought Sammy was dying, I wished he would please get him some water. He said he wished the —

Powers v. Powers.

—— — young one would die or sink into hell. He finally brought the water and set it on the piano. * *

* * When he was drunk he would tantalize the boy and teach him to swear. One night he came in drunk while I was undressing Sammy and he did not want his clothes off. I was playing with him. Mr. Powers came in and said, 'If you can't make that young one mind I will.' He grabbed hold of him and struck him with his cane, and we jumped and screamed and took Sammy away from him. He said he did not think he was hitting him so hard as that. * * * * He would swear at me and tell me I was a —— —— fool. He always told me I was a —— —— lazy hussy and he has called me a bitch ever so many times. * * * * My health was poor when I went home. It was from his drinking. I used to be afraid of him. He would walk the floor and flourish his cane and act as though he would strike me. I used to be afraid he would kill me. I used to sit up all night, thinking he would kill me before morning."

In so far as the profanity of defendant is concerned, I think it unnecessary to refer to the testimony of any other witness, as the proof is abundant on this point. This of itself furnishes no ground for a divorce, yet when taken in connection with other facts it may very properly be considered as giving color to the conduct of plaintiff when accompanied with the indulgence of this detestable and pernicious habit. The constant use by a husband of profane language to a wife, will not ordinarily furnish very strong evidence of that high degree of affection and sweetness of disposition which is supposed to add to the pleasures of home.

The testimony of plaintiff as to the treatment received from her husband is fully corroborated by the witness Emma Welch, and in some degree by the testimony of Mrs. Birney and Charles Birney. The testimony of Emma Welch is sharply criticised by counsel for defendant, and

apparently not without cause, for she seems to have been prompted by a desire to render what aid she could to plaintiff's cause; yet it is possible she might have been, in the main, correct.

The testimony given on the part of plaintiff was all pointedly and flatly contradicted and denied by defendant and his witnesses, and had the trial court adopted the line of testimony presented by him as true, the finding could and would have been sustained on appeal. By the testimony produced by defendant, if uncontradicted, it is made to appear that, aside from his habit of profanity, he has been a kind and affectionate husband. But upon this the trial court has acted, and we cannot say that the decision is manifestly or clearly wrong.

It is shown, I think, to the satisfaction of any candid mind, that defendant was in the habit of using intoxicating liquors to a great degree of excess. The trial court found the charge of habitual drunkenness not proven. With that part of the case we shall have nothing to do. But we may remark that there is abundance of proof that defendant did drink at times to excess, and that when under the influence of liquor he was boisterous, quarrelsome, oppressive, and, at least, disgustingly unpleasant. This alone might not fill the legal requirement as to habitual drunkenness. But if these practices were indulged in at home in the presence of the family, taken in connection with the habit of profanity, they would very clearly give character to the acts testified to by plaintiff and her witnesses. Occasional drunkenness cannot be a ground for divorce, but such drunkenness of the character detailed by the witnesses, if believed, would not only add a poignant sting to cruelty in the way of danger, but would add also to the anguish of the recipient of the treatment by a fear of aggravated violence. Suppose the testimony of plaintiff is true, as was no doubt found by the court,—that he would walk the floor and flourish his cane and act as though he

would strike her, and that she would sit up all night thinking he would kill her before morning, and as stated by an apparently disinterested witness, his conduct seemed to be affected by the use of liquor, and he under the influence of the same, from ten to fifteen drinks a day," what would naturally be the effect upon the wife? Clearly, I should say, this would be "extreme cruelty, whether practiced by personal violence or by other means," as prescribed by section 7, chapter 25 of the Compiled Statutes as ground for a divorce.

The question of the custody of the child is one which must be decided by the application of substantially the same rules as are applied to the foregoing. If the testimony of plaintiff and her witnesses is true, the decree for the custody of the child was proper.

Plaintiff contends that the amount of alimony allowed her was insufficient. Taking the whole testimony together as to the financial condition of defendant, we cannot say it was too low.

The time for the payment of the alimony having, in part, elapsed, the decree will be so modified as to require the payment of the \$2,500 as follows: \$800 within thirty days, \$800 within four months, and the remainder within nine months from date. The whole to draw interest at the rate of seven per cent from the date of the rendition of the decree in the district court.

In all other respects the decree of the district court is affirmed.

DECREE ACCORDINGLY.

THE other judges concur.

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| 22 | 92 |
| 22 | 722 |
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| 20 | 428 |
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| 20 | 538 |
| 41 | 701 |
| 20 | 538 |
| 44 | 137 |
| 30 | 538 |
| 55 | 651 |

JAMES GIFFORD, PLAINTIFF IN ERROR, v. THE REPUBLICAN VALLEY AND KANSAS RAILROAD COMPANY, DEFENDANT IN ERROR.

1. **Railroads: RIGHT OF WAY: APPEAL.** The right of appeal from the award of commissioners in the assessment of damages sustained by an owner of real estate by the appropriation of the same to the use of a railroad corporation, may be availed of and perfected by the filing of a transcript from the county judge of the condemnation proceedings in the district court, or the office of the clerk thereof, within sixty days after the filing of the report containing such award with the county judge.
2. ———: ———: ———. When such transcript is not filed, nor sufficient cause shown for such failure, without laches on the part of the appellant, the appeal will be dismissed.

ERROR to the district court for Harlan county. Tried below before GASLIN, J.

Lamb, Ricketts & Wilson and *P. J. Dempster*, for plaintiff in error.

T. M. Marquett and *J. W. Deweese*, for defendant in error.

COBB, J.

This case arises upon an appeal from the award of damages to the appellant and plaintiff in error, caused by the taking of its right of way over his lands by the railroad company, defendant in error.

It appears from the record that on the 13th day of May, 1885, application on behalf of the railroad company was made to the county judge of Harlan county for the appointment of six disinterested freeholders of the county to be summoned to assess the damages to the owners of certain real estate therein described, including the lands of the plaintiff in error. On the same day the sheriff is-

sued a summons to the six persons therein named for the purpose aforesaid, which summons was served and returned on the following day. It further appears that on the 15th day of May, 1885, the said commissioners made their report in case of each tract of appellant's land, and on the 16th day of May, 1885, the said reports were in each case filed in the office of the said county judge, and the amount of damages as assessed by the commissioners in each case paid by said company into the office of the said county judge for the use of the plaintiff in error.

There are in the record three notices of appeal by the plaintiff in error, one applicable to each of his separate tracts of land over which the right of way was assessed. These notices are addressed to L. H. Kent, county judge, are each dated July 8, 1885, one of them marked as filed in the office of the county judge July 9, 1885. There are also three notices of appeal (one applicable to each tract) addressed to the railroad company, served on said railroad company, as therein certified, by delivering a copy thereof in each case, on the 10th day of July, 1885, to Frank Denniny, "the duly authorized agent of said company." These notices are marked as filed by the clerk of the district court July 15, 1885.

It also appears that on the said 15th day of July, 1885, the said Gifford, plaintiff in error herein, filed a petition in the said district court, applicable to the said assessment of damages for right of way over each of his said three tracts of land.

At the September term of said court, on the 29th day of September, 1885, the said railroad company made a special appearance in said cause in said court and objected to the jurisdiction of said court to entertain the said appeal and to try said cause for the following reasons:

"1. No transcript on appeal was filed within sixty days from the date of the assessment of damages, and no appeal taken within said time as provided by statute.

"2. No notice of appeal was ever served on the defendant of the taking of said appeal within sixty days from the time of the assessment of the damages by the commissioners."

Certain affidavits were filed, as well by the appellant as by the defendant, and considered by the court in disposing of the above objection, one or more of which will be hereinafter again referred to.

On the 30th day of September, 1885, and before the disposition of the above objections, a transcript of the condemnation proceedings from the office of the county judge was filed in the district court.

On the 3d day of October, 1885, the district court sustained the objection of the defendant to its jurisdiction to entertain the said appeal and try said cause, and thereupon dismissed the said appeal at the costs of the plaintiff.

The plaintiff brings the cause to this court on error. The errors assigned are—

1. The court erred in dismissing the appeal in said cause, and in dismissing said cause.
2. The court erred in rendering judgment for the defendant in said cause.

Section 97, of chapter 16 of the Compiled Statutes, after providing for the selection and summoning of six disinterested freeholders of the county, for the purpose of assessing damages where right of way for railroads is sought to be appropriated, and pointing out the duties of such freeholders as commissioners in making, certifying, and reporting such assessment, contains the following proviso: "*Provided*, That either party may have the right to appeal from such assessment of damages to the district court of the county in which such lands are situated, within sixty days after such assessment. And in case of such appeal, the decision and finding of the district court shall be transmitted by the clerk thereof, duly certified to the county clerk, to be filed and recorded as hereinbefore provided in his office," etc.

As to how such appeal shall be made or taken, what papers filed or oaths taken, or whether any, the statute is wholly silent. And yet it will not be denied but something must be done to bring the case within the jurisdiction of the district court. Nor will it be denied that whatever must be done to give the appellate court jurisdiction, must be done within sixty days after such assessment. The word assessment, here, doubtless covers all of the official acts of the commissioners or assessors in respect to the real estate in question necessary to its appropriation, so that the sixty days during which the right of appeal, if declared to exist, commences to run upon the performance of the last official act of the commissioners, to-wit, the making of their report in writing to the county judge of the county; that is to say, delivering their report to said county judge.

As above stated, it will not be denied that it is necessary that something must be done by the party who would avail himself of the right of appeal guaranteed to "either party" by the statute above quoted; and whatever that thing is, or things are, it cannot be something that is merely voluntary on his part, which he may do or not do, and still by the doing of some other or different thing bring himself within the benefits of the law and give the appellate court jurisdiction of his case.

In the case at bar, the plaintiff served a notice upon the county judge that he appealed to the district court from the finding and award of the commissioners, etc. This notice was served within sixty days from the assessment of damages. He also served a like notice, addressed to the defendant company, upon a person who had acted as right of way agent, or assistant right of way agent of the defendant company, in and about the said condemnation proceedings. This notice was also served as aforesaid within sixty days from the assessment of damages. Whether this person was such an agent of the defendant company upon

whom service of process or of notice in a proper case could be made as upon said corporation, is a question raised and discussed in the briefs, but which, with my views of the controlling question involved in the case, it is deemed unnecessary to decide.

The plaintiff also, within sixty days from the assessment of damages, filed in the district court a petition against the said railroad company, based upon his claim for damages for such right of way greater than those awarded by said commissioners.

Were either or all of these proceedings sufficient to constitute an appeal, and to give the district court jurisdiction of the case? So far as notice is concerned, I remember no case, nor are we cited to any, where notice to the opposite party has been held to be a jurisdictional matter in the case of appeal under any statute. It has often been held to be the right of an appellee to have notice before the appellant would be permitted to proceed with the case, but not as a matter of jurisdiction.

In the case of *R. V. R. Co. v. Linn*, 15 Neb., 234, it was assigned for error that the district court overruled a motion to dismiss the appeal for the want of notice. The point was disposed of in this court upon the consideration that both parties in that case appealed from the award of the commissioners. But in writing the opinion I made a thorough search of the authorities, and rather from what I failed to find, reached the conclusion that no notice was necessary, even outside of the consideration that there were mutual appeals in that case. I am still of that opinion, and if I am correct, then the reverse of the proposition is equally true, and the service of a notice in such case being unnecessary, is voluntary and gratuitous, and confers no jurisdiction upon the appellate court.

In the case of *Neb. Railway Co. v. Van Dusen*, 6 Neb., 160, the error assigned was that the district court dismissed the appeal of the railroad company on motion of

Van Dusen, the ground of such motion being, *First*, That "no appeal bond had been given," and, *Second*, Because the plaintiff "had not prosecuted its appeal as provided by law." In the opinion reversing the case, the court, by Judge GANTT, said: "In appeals from the assessment of damages in cases like the one at bar, it is not essentially requisite to file pleadings in the district court, and it has not been usually the practice to do so."

If, then, it is not necessary to file pleadings in cases of this kind, the gratuitous and unnecessary filing of a petition therein cannot be held to supply the want of such papers or proceedings as are requisite.

The general understanding of the profession in this state has been, as I believe, that the essentially requisite proceeding to perfect an appeal from the award of commissioners, in a case of this kind, and to give the district court jurisdiction of the same, is to file in the said court, or in the office of the clerk thereof, a certified transcript, from the county judge, of the condemnation proceedings, from the original application to said county judge for the appointment of commissioners to the report of such commissioners in the respective case, both inclusive.

The case of *Republican Valley R. R. Co., v. McPherson*, 12 Neb., 480, arose upon "an original action brought in the district court by Mrs. McPherson to reinstate her appeal, which had been dismissed by said court for the reason that a transcript had not been filed therein within sixty days from the assessment of damages. In her petition she alleged that the right of way over her land was condemned for the use of said railroad company on the 7th day of November, 1879; that no record of said proceeding was kept in the office of the county judge of said county; that on the 22d day of December, 1879, and at various other times, said Mary McPherson notified said judge of her intention to appeal said cause to the district court of said county, and she tendered to him the fees and demanded a transcript of

said proceedings to file in said district court, but was unable to obtain the same. * * * That as soon as she possibly could procure a transcript from said county judge she did so, and handed the same to the clerk of the district court. * * * That on account of the refusal of said county judge to make and deliver to her the said transcript, she was unable to file the same within the sixty days allowed by law," etc. This court, by the present chief justice, in the opinion, say: "It is also stated that at the May term of 1881 of said court, said appeal was dismissed because the transcript was not filed within sixty days. Two affidavits are also filed in support of said petition. The question to be determined is, did the district court err in reinstating the appeal? The petition and affidavits show diligence on the part of the applicant, and that she made every effort to perfect the appeal within the time limited by statute, but was prevented by the negligence or failure to perform his duty of the county judge. The case, therefore, falls within the rule laid down in *Dobson v. Dobson*, 7 Neb., 296, and is sufficient to entitle the party to an appeal."

In the case at bar the transcript of the condemnation proceedings was not filed in the district court within the sixty days provided by law. It appears from the affidavit of P. J. Dempster, attorney for plaintiff in error, that some effort was made by him to comply with the law in that respect, and this brings us to the real question upon which the case must turn. Did the plaintiff use due diligence, and was he prevented from complying with the law and perfecting his appeal in time by the negligence or fault of some officer of the law?

The evidence upon this point before the district court and before this, consists of the affidavit of Mr. Dempster above referred to, and that of L. H. Kent, county judge, both of which I here copy.

"P. J. Dempster, being first duly sworn, deposes and

says that he is the duly authorized agent of James S. Gifford, the plaintiff in this case. That on or about July 9, 1885, I wrote to L. H. Kent, county judge of said county, and ordered transcript of all records made by him in the above mentioned proceedings, and also requested him to deliver or send said transcript to J. A. Piper, clerk of district court of Harlan county. That on or about July 14, 1885, I sent the petition filed herein to J. A. Piper, clerk of district court of said county, to be filed with the transcript of proceedings had before the county judge in the premises, supposing that said transcript had been previously delivered, as requested, by the county judge, and knew no better until a few days later, when I was informed by said clerk of district court that no transcript had been delivered to him."

"L. H. Kent, being duly sworn on oath, says that he is the identical L. H. Kent who is county judge of Harlan county. That on or about July 9, 1885, P. J. Dempster mailed to me three notices of appeal on the awards made by the commissioners for the right of way of the Republican Valley and Kansas Railroad Co. over the land of J. S. Gifford, in Harlan county, Nebraska. That I am unable to find the letter of said P. J. Dempster, which was in the same envelope with the notices of appeal. That in said letter said Dempster asked me if a bond was necessary in taking the appeal. That I have no knowledge of said Dempster requesting a transcript of said proceedings. That I supposed that when I had the commissioners' award recorded in the clerk's office that that was a sufficient transcript. That I delivered said award to J. A. Piper, county clerk, or his deputy, for record. That no one ever came to me, or made a personal request of me for any further transcript than the awards which I gave to Piper for record, until September 29, 1885. That no one ever tendered or paid me any fees for any transcript whatever."

It will be seen by an examination of Mr. Dempster's af-

fidavit that it falls far short of bringing the case within the facts or reason of the case of *Railroad v. McPherson*, *supra*. There the appellant had applied more than once to the county judge for a transcript, and tendered him his fees therefor, and had been deprived of her appeal in time by the unlawful refusal or negligence of the county judge to furnish the transcript. She had placed herself in a position to demand the service of the county judge as a matter of law and of right. That she was deprived of them was the fault of the constituted authority, and was traceable to no laches on her part. In the case at bar the plaintiff, according to the affidavit, ordered a transcript by letter and requested the county judge to deliver or send it to the clerk of the district court. This was not a service which in any event or upon any demand and tender of fees would become due to the plaintiff, or to any party from the county judge. It was not demanded as a matter of law or of right, but requested doubtless as a matter of favor or courtesy. Had this service been performed by the county judge as requested, so far as delivering or sending the transcript to the clerk of the district court was concerned, he would have done it only as the friend or agent of the plaintiff or of his attorney, and not in his official capacity as county judge, and so his failure or neglect in that regard is the failure or negligence of the plaintiff.

I come to the conclusion, therefore, that the essential act by which an appeal, in cases of this kind may be taken, and the right preserved is the filing of a transcript in the district court. And that not having been done in this case within the time limited by statute, nor sufficient cause shown for such failure without laches on the part of the appellant, the appeal was rightly dismissed.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

The other judges concur.

CHARLES P. BROWN, PLAINTIFF IN ERROR, V. W. M.
ROGERS & BRO., DEFENDANTS IN ERROR.

1. Evidence examined and *Held* to sustain the verdict.
2. Pleadings: AMENDMENT. The court, upon such terms as may be just, may permit the amendment of a pleading after the evidence is introduced, and before the cause is submitted to the jury, and unless there is an abuse of discretion in the action of the court, error will not lie.
3. Instructions set out in the opinion, *Held*, Properly given.

ERROR to the district court for Harlan county. Tried below before GASLIN, J.

C. C. Flansburg, for plaintiff in error.

Oyler & Beall, for defendants in error.

MAXWELL, CH. J.

This action was brought on the following due bill:

"EVA, NEB., Nov. 4th, 1884.

"Due Woods & Batey, balance on Bird windmill, fifty dollars (\$50).

"[Signed] W. ROGERS & BRO.

"Endorsed, 'December 30th, 1884, received five (\$5) dollars by J. G. Woods. Please pay to the bearer forty-five (\$45) dollars. BATEY & WOODS.'"

On the 19th day of January, 1886, defendants filed their answer as follows:

"Defendants for answer to plaintiff's petition herein filed state:

"First. That on or about the day of, 1884, these defendants entered into a verbal contract with Batey & Woods, of Alma, wherein said Batey & Woods agreed with and undertook for the defendants to erect for them a

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| 48 | 30 |
| 20 | 547 |
| 57 | 648 |

certain Bird windmill and pump, and said windmill and pump guaranteed by the said Batey & Woods to be first class in every particular, and to be erected in good and workmanlike manner, and warranted to give satisfaction.

"Second. That these defendants agreed to pay in consideration for said mill, when erected as aforesaid, the sum of \$....., and that the note or due bill herein sued upon was given as part of said consideration.

"Third. Defendants further say that said Batey & Woods did not erect such a windmill and pump as was contracted for as aforesaid, and that the mill and pump erected by said Batey & Woods by virtue of said contract were worthless and wholly failed to give satisfaction, to the damage of these defendants in the sum of \$100."

The reply is a general denial.

On the trial of the cause the jury found a verdict for the defendant, upon which judgment was rendered.

It would subserve no good purpose to set out the evidence at length. It tends to show that the windmill and pump were to be first class in all respects, and that they were very inferior, and of but little value. The defendants had already paid a considerable portion of the price of the mill, the due bill being merely for a small balance. The verdict, therefore, was fully justified by the evidence.

2. After the evidence was all submitted, the court permitted the defendants to amend their answer by adding the words, "And defendants, relying upon said warranty, purchased the mill and pump aforesaid." This is now assigned for error. The amendment probably was unnecessary, as it is alleged in the second paragraph of the answer "that these defendants agreed to pay in consideration for said mill when erected as aforesaid the sum of \$...., and that the note or due bill herein sued upon was given as a part of said consideration." This would seem to be sufficient to show reliance upon the contract of warranty. But even if it were not, the amendment could not have misled

the plaintiff, and was in the discretion of the court, and as there is nothing to show an abuse of such discretion the objection is unavailing.

3. That the court erred in the instructions given to the jury as follows:

"1st. If you find from the evidence in this case, the party or parties who sold the windmill and pump to defendants, for balance of payment of which the due bill sued on in this case was given, and when the pump and mill was sold the vendor or vendors of said pump and mill guaranteed that the same was to be first class in every respect and to be erected in good workmanlike manner, and warranted to give satisfaction, and you find defendants relied upon such guaranty or warranty when they purchased the said pump and mill, and you find there was a breach of said guaranty and warranty, and you find the said pump and mill were worthless, as averred in the answer, or not such a pump and mill as guaranteed, you will assess the damages occasioned to defendants by breach of said guaranty or warranty, bearing in mind the measure of damages is the difference in value of said pump and mill in the condition they actually were in at the time of sale of same and the value of such a pump and mill as was warranted.

"2d. If you find there was no guaranty or warranty of the pump and mill, or you find if they were guaranteed or warranted, and there was no breach thereof, you will find for the plaintiff the full amount of the due bill sued on and interest at 7 per cent per annum.

"3d. The burden of proof is upon the defendants to show the guaranty or warranty set up in the answer and breach thereof."

It is conceded that the first instruction is correct as an abstract proposition of law, but it is said not to be applicable to the testimony. We think differently, however, and that the instruction was properly given. On the whole case it is apparent that justice has been done, and that there

is no material error in the record. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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R. M. COOL, PLAINTIFF IN ERROR, V. ROCHE, HALL & RAY, DEFENDANTS IN ERROR.

1. **Trial: CONTRADICTIONARY STATEMENTS OF WITNESS.** Where evidence showing contradictory statements of a witness is introduced without first calling his attention to the time, place, and person involved in the supposed contradiction, and no objection is made to such evidence, the jury may consider it, and, if sufficient, base their verdict thereon.
2. **Chattel Mortgage: RECORD: NOTICE.** Where a chattel mortgage is duly filed in the county where the mortgagor resides, and is constructive notice there, it will be constructive notice into whatever county the mortgagor may remove with the property.

ERROR to the district court for Antelope county. Tried below before TIFFANY, J.

Scott & Gilbert, for plaintiff in error.

Thos. O'Day, for defendants in error.

MAXWELL, CH. J.

In October, 1881, the defendants herein brought an action of replevin to recover the possession of "one bay mare, seven years old, called Kitty, one bay mare, seven years old, called Molly, and one brown horse, eight years old, called General." The defendants claimed a special ownership in the property by virtue of a chattel mortgage executed by

J. B. Meehan on the 12th day of October, 1880. The answer is a denial of the wrongful detention.

On the trial of the cause the defendants offered in evidence a chattel mortgage on said property, executed on the 12th day of October, 1880, to secure the payment of a promissory note of that date executed by said Meehan for the sum of \$200. The plaintiff in error (defendant below) then introduced the deposition of one Bennett, who testifies: "I was a resident of Waco, York county, Nebraska, in 1880, and justice of the peace; was well acquainted with J. B. Meehan and Samantha C. Meehan, who executed the mortgages upon which the defendant relies in this case. One was executed by J. B. Meehan to Oliver Nolan, of date July 12, 1880, and filed in clerk's office, York Co., on same day, and was given to secure part of the purchase price of a horse. None of said claim has been paid, and one mortgage was given by Samantha C. Meehan to secure the payment of \$150 borrowed money, all of which remains due and unpaid, except the sum of \$3 endorsed on note. Affiant was present when the notes and mortgages were executed and delivered, and the said mortgages cover the identical property in controversy in this case. The note and mortgages were executed by Samantha, and dated July 12th, 1880, and filed in clerk's office, York county, same day. That said Meehans both lived in York county when the said mortgages were executed, and the said property was in York county at that time.

"That at the time said property was replevied in this action, it was in the hands of Cool, as sheriff, by virtue of a writ of replevin at the suit of Will E. Sharp, against one P. D. Thompson, who at that time had possession of it. That affiant was present when property was replevied by these plaintiffs from defendant Cool, and knows that it is the identical property set out in the mortgages given by the Meehans to Nolan & Radford—and that said Sharp is the owner of the notes and mortgages so executed by J. B. and Samantha C. Meehan."

Copies of the mortgages given to Nolan and Radford are set out in the record. The proof tended to show that the mortgages were duly filed in York county.

On behalf of the defendants in error, one Sloan testified that in 1880 he was clerk in the Commercial Hotel, for Dr. Lease, and clerked also at the same hotel for Mr. Meehan. "Am acquainted with John S. Bennett, of Waco. I saw him in October and December, 1880. I recollect at the time he was here, at the time those horses were replevied. I saw him here. At the time the horses were replevied, I saw him here. I was out at the pump at the barn when Bennett went through looking over the horses he claimed he had a chattel mortgage on. He asked me if I knew and asked me to show them to him. I went into the barn. I pointed out the two bay mares described in petition. I showed him several others and he made no reply until I came to these two bay mares that Mr. Roche had afterwards. When I pointed out these he asked me if I wasn't mistaken. He said, 'Those two?' and I said 'Yes, sir.' He says, 'Are you not mistaken?' He told me those were not the horses in that way. He said I must be mistaken. I said again, 'Those are the two,' and he said I was mistaken. I don't recollect Mr. Meehan saying anything about purchasing those mares in St. Paul, this state. The man I was working for said he knew the mare in St. Paul; his brother tried to purchase her. That man was George Nolan. He said he knew that mare before Meehan bought her. I pointed that horse out to Mr. Bennett. He asked me some questions about her, and asked me if I was certain he bought her; I told him I was. Mr. Finch, a lawyer, took a brown horse and a buggy, and a lot of other stuff. I told Mr. Bennett about it, and he said that was the one he wanted."

CROSS-EXAMINATION.

"I refer to brown horse called 'General,' or 'Colonel,' he being the same horse Meehan brought here; called him

Cool v. Roche, Hall & Ray.

‘General.’ Have referred to bay mares in my testimony, don’t remember their names, but were the same mares Roche had, and the ones described in his mortgage. I knew the horses at the time and afterwards. Mr. Bennett wanted to know if I was not mistaken about them, that is the horses Meehan brought here with him. He asked me to go and show him the horses. I showed him two or three, one sorrel. He made no reply or asked any questions. I pointed to the bay mares in the third stall on the left hand side. He said, ‘I guess you are mistaken.’ I said ‘No,’ and he said again, ‘Are you sure?’ ”

RE-DIRECT EXAMINATION.

“Mr. Bennett had been out looking over the horses. I went to the barn. I recollect before this of Mrs. Meehan driving off a pair of bay mares with one of Dr. Lease’s buggies. I think she started down from St. Paul; it was to Waco. I remember particularly about it. Dr. Lease was gone, and when Dr. Lease was gone I attended to his business. He found some fault with me about letting it go, and fretted about it considerably.”

JOHN J. ROCHE, RECALLED.

“I remember a conversation in the bank of Neligh, Nebraska, about the 15th of December, 1880, between Thos. O’Day and John S. Bennett, the witness whose deposition has been read, in the presence of Dr. Lease and myself. I asked Mr. Bennett if he had found his property. He said he hadn’t, and he was positive the property we had was not the property he wanted. He said, as near as I could find out, the bay team had been driven away from Neligh by Mrs. Meehan, and the brown horse and bay horse had been driven away by somebody else. I think Finch. He said that was the property covered by his mortgage. It was Mrs. Meehan who formerly came from, and he thought she had gone to York where she came from. There was present at that conversation yourself

(meaning Mr. O'Day), Dr. Lease, myself, and Mr. Bennett, and I think Lewis Warren. That was before this replevin suit commenced. Mr. Meehan told me this property was all clear, and no liens on it whatever."

CROSS-EXAMINATION.

"The property was in Neligh at the time. Mr. Bennett referred to the property covered by our mortgage. The property in controversy was all included in the mortgage."

RE-DIRECT EXAMINATION.

"At the time we took the chattel mortgage on this property I had a conversation with Mr. Meehan; he said the property was all clear, no liens on it whatever."

This testimony, so far as the abstract shows, went in without objection, and is sufficient to have warranted the verdict.

The instructions excepted to are set out in the abstract, and are as follows:

"5. You are instructed that a chattel mortgage is *prima facie* fraudulent as to creditors and *bona fide* purchasers where the mortgagor retains possession of the mortgaged property, and is conclusive evidence of fraud, unless the party claiming under such mortgage was given in good faith.

"6. You are instructed that when, as in this case, there is a controversy between two mortgagees, the party attacking the *bona fides* or good faith of a prior mortgage must first establish the *bona fides* or good faith of his own mortgage, and in order to do this he must show that he had no notice of the prior incumbrance.

"Applying the law, as above defined, to the case at bar, it would be necessary for the plaintiffs to first prove that their mortgage was taken for a good consideration, and without notice of the prior mortgage, by virtue of which the defendant held the property. If they have established the above, the burden then of proving the good

faith of the mortgages executed in York county were executed in good faith, and not in fraud of creditors in order to overcome the *prima facie* evidence of fraud which attaches to them.

"8. If you find, therefore, that the plaintiffs have shown this good faith of their mortgage, and then that they were taken without notice of the other mortgages, your verdict should be for the plaintiffs. If, on the contrary, you should find from the evidence that the plaintiffs have not shown the good faith of their mortgage, and that the other mortgages were executed in good faith, and that the plaintiffs had notice of the same, your verdict should be for the defendant."

The fifth instruction is copied substantially from section 11, chapter 32, Compiled Statutes, the concluding part of the section being omitted. But the omission was not so prejudicial to the plaintiff in error as to require a reversal of the case. The 6th, 7th, and 8th paragraphs, however, seem to ignore the question of filing the mortgage—of constructive notice.

Sec. 14, chapter 32, Compiled Statutes, provides that "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith unless the mortgage or true copy thereof shall be filed in the office of the county clerk of the county where the mortgagor executing the same resides, or in case he is a non-resident of the state, then in the office of the clerk of the county where the property mortgaged may be at the time of executing such mortgage," etc.

Sec. 15 provides for an index of mortgages, and Sec. 16 that the mortgage shall be valid for five years.

A chattel mortgage duly filed in the county in which the mortgagor resides, at the time the same is executed and filed, need not be again filed in the county to which he removes. *Hoit v. Remick*, 11 N. H., 285. *Whitney v. Heywood*, 6 Cush., 82. *Barrows v. Turner*, 50 Me., 127. *Hick v. Williams*, 17 Barb., 523.

In *Kanaga v. Taylor*, 7 O. S., 134, where a chattel mortgage was executed in the state of New York upon certain personal property, which was afterwards, and during the existence of the lien of said mortgage, removed to the state of Ohio, the court held that, the mortgage having been duly recorded in the town where the mortgagor resided at the time of its execution, the lien continued notwithstanding the removal of the property to another state. *Smith v. McLean*, 24 Iowa, 322.

All the cases, so far as we have observed, seem to agree that where a chattel mortgage is duly filed in the proper county so as to be constructive notice in such county, the constructive notice imparted by the record extends to whatever county in the state the mortgagor may remove to while the lien of the mortgage exists. The court, therefore, erred in giving the 6th, 7th and 8th paragraphs of the instruction above set forth. The judgment of the district court is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

The other judges concur.

**PETER A. BUCKMASTER, PLAINTIFF IN ERROR, V. JAMES
MCELROY ET AL., DEFENDANT IN ERROR.**

Liquors: PETITION TO RECOVER DAMAGES. A petition alleging that the defendant, a licensed saloon keeper, was engaged in the business and traffic of keeping a saloon and selling intoxicating liquors therein, and that the plaintiff went into said saloon and called for whiskey, and in response to said call obtained intoxicating liquor in said saloon, by the drink, which plaintiff drank in said saloon, and thereafter, about evening of said day, started on his journey to his home, which was distant about five miles. That said intoxicating liquor, so obtained in said saloon of defendant, from said defendant, and there drank by plaintiff, greatly affected the nervous system of plaintiff and caused the plaintiff to become and be stupified and unconscious. That said day, evening and night, were very cold, that when in the following morning plaintiff regained his consciousness he was lying out of doors on the ground and both of his legs frozen to such an extent that they had to be amputated and were amputated. That plaintiff is a common laborer, and by the loss of his legs has been permanently incapacitated and deprived from following his occupation, and thereby wholly deprived of the means of livelihood, to his damage, etc. *Held*, To state facts sufficient to constitute a cause of action.

ERROR to the district court for Dodge county. Tried below before POST, J.

Frick & Dolezal and *C. Hollenbeck*, for plaintiff in error.

E. F. Gray, for defendant in error.

COBB, J.

Action was brought in the court below by Peter A. Buckmaster against James McElroy, Charles B. Veazie, and Luther I. Abbott. As the cause was disposed of in that court on demurrer to plaintiff's amended petition, I copy that pleading in full:

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| 20 | 557 |
| 28 | 154 |
| 30 | 557 |
| 36 | 116 |
| 40 | 557 |
| 45 | 839 |
| 50 | 557 |
| 51 | 144 |
| 60 | 557 |
| 62 | 208 |
| 62 | 806a |

"AMENDED PETITION.

"The plaintiff alleges that on the 10th day of April, 1884, the said defendant McElroy, as principal, and the other defendants as sureties, executed and delivered to the state of Nebraska their certain bond in the penal sum of \$5,000, conditioned that the defendant, McElroy, will pay all damages, fines and forfeitures, and penalties that may be adjudged against him under the provisions of the law regulating the sale of malt, spirituous and vinous liquors. (A copy of the bond is attached to the petition, but there being no objections to its form or substance it is omitted from the abstract.) That in accordance with said law regulating the sale of said liquors, the city authorities of the city of Fremont duly approved said bond and issued a license to said McElroy, in due form, to sell malt, spirituous, and vinous liquors in said city for the period of one year, from the 29th of April, 1884, to the 28th day of April, 1885. That in accordance with and under said license said defendant McElroy engaged in the business and traffic of keeping a saloon in said city and selling such liquors therein, and was so keeping said saloon and selling liquors during all the month of November, 1884. That on or about the — day of November, 1884, and in the afternoon of said day, the plaintiff went into the saloon of said defendant McElroy, and there called for whiskey, and in response to said call obtained intoxicating liquor in said saloon, by the drink, which plaintiff drank in said saloon; and thereafter, about evening of said day, started on his journey to his home, which was distant about five miles from said city of Fremont. That said intoxicating liquor, so obtained in said saloon of the defendant McElroy, from said defendant, and there drank by plaintiff, greatly affected the nervous system of plaintiff, despite his efforts to the contrary, to become and be stupified, numb and unconscious. That said day and evening and night thereof were

very cold, and when plaintiff regained his consciousness, which was the following morning, he, plaintiff, was lying out of doors, on the ground, out of his journey, and both of his legs were frozen to such an extent that both of said legs had to be amputated and were accordingly amputated. That plaintiff is a common laborer, and by the loss of his legs has been permanently incapacitated and deprived from following his occupation and has thereby been wholly deprived of the means of his livelihood, and by reason of the premises has been damaged in the sum of five thousand dollars. The plaintiff alleges that he became so stupified and numb and lost consciousness and his legs were frozen and amputated, and he has been damaged as aforesaid, solely in consequence of the traffic of said defendant, McElroy, in said intoxicating liquors as aforesaid, and the sale to plaintiff, and drinking of the said intoxicating liquors sold and drank as aforesaid. Plaintiff asks judgment against defendant for five thousand dollars."

After certain preliminary proceedings, unnecessary to be further referred to here, the defendant filed a general demurrer to the said petition, and thereupon the following proceedings were had by the court, as shown by the journal entry, which I copy:

"This cause came on to be heard this day on the demurrer of defendants to the amended and substituted petition of the plaintiff, on consideration whereof, and being fully advised in said premises, the court does sustain said demurrer, to which ruling of the court the plaintiff excepted, and the plaintiff not desiring further to amend his petition, it is considered and adjudged by the court that said action be dismissed and the defendant go hence without day, recover of the plaintiff his costs herein expended, taxed at — dollars, to which ruling and judgment the plaintiff excepted.

"The cause is brought to this court by the plaintiff, who assigns the following errors:

"1st. The court erred in sustaining the demurrer of the defendants.

"2d. The court erred in entering judgment in favor of the defendants, instead of in favor of plaintiff."

These assignments of error will be considered together, as they present but a single question.

The section of the statute, Comp. Stat., chap. 50, under which the action was brought, reads as follows:

"SEC. 15. The person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic; he shall support all paupers, widows, and orphans, and the expenses of all civil and criminal prosecutions growing out of, or justly attributed to his traffic in intoxicating drinks," etc.

The question controlling this case arises upon the meaning of the above words of the statute, and especially the word "individuals" as there used. Does this word, as here used, include in its meaning the individual who participates in the said traffic by purchasing the identical intoxicating liquor, from the use of which the intoxication and damages result? This question has not heretofore arisen directly, nor has its consideration been necessary in any case decided by this court.

In the case of *Roberts v. Taylor*, 19 Neb., 184, which was an action by the wife for the loss of support of the husband caused by intoxication from liquor furnished him by the defendant, the court, in the opinion by the Chief Justice, say: "His testimony shows that in February, 1884, Mrs. Taylor notified the plaintiff in error not to sell her husband any more liquor; that afterwards, about August 15, finding that her husband obtained all the liquor he wanted in bottles, she went with him to the residence of the plaintiff in error and withdrew the order, and, as she testifies, told Roberts that if he would only give him a drink occasionally as he needed it, he might sell to him. It is not claimed that for liquor sold the husband in small

quantities while this request was in force, that there could be any recovery; but for any abuse of the same, no doubt there may be." Here, it must be admitted, is an intimation that the maxim *volenti non fit injuria* might be applied to cases arising under the provision of the statute which we are now considering, but the point was deemed an unimportant one in the case, and what was said thereon as not worthy to be placed in the syllabus.

I find really nothing in the cases from the courts of other states cited by counsel on either side, which to my mind tends to assist in placing a construction upon the language of our statute above quoted.

The case of *Rosencrats v. Shoemaker*, 26 N. W. R., 794, came before the supreme court of Michigan under a liquor law, the liability clause of which reads as follows:

"SEC. 3. Every wife, child, parent, guardian, husband, or other person who shall be injured in person, property, or means of support, by any intoxicated person, or by means of the intoxication of any person, shall have a right of action in his or her own name against any person or persons who shall, by selling or giving any intoxicating liquor, have caused or contributed to the intoxication of such person or persons," etc.

That case was brought by a widow against the defendant for furnishing intoxicating liquor to her late husband, who was killed, while intoxicated, by a train of cars. There was evidence tending to prove that the plaintiff authorized defendant to furnish him liquor, and procured it for him herself. This evidence was contradicted. The court was asked to charge, "If the jury find that defendant was authorized by plaintiff to furnish her husband liquors, she cannot recover damages for injuries sustained by reason of defendants having furnished her husband liquor, unless he was intoxicated when such liquors were furnished." The request was refused. The supreme court, in the opinion, say: "Under the statute * * * it is expressly de-

clared that whatever damages are recovered by a wife or child, shall be the plaintiff's sole and separate property, and every person injured shall have a right of action in his or her own name. As the wife sues solely in her own behalf, it is evident that she cannot complain of any evil which she herself has caused, and that if she encouraged or requested the sale of liquor to her husband, she does not stand on the footing of an innocent injured party." A new trial was awarded.

The code of Iowa, of 1873, contains a section (sec. 1557, p. 289) almost identical in its language with that of the state of Michigan above quoted. Under it the case of *Engleken v. Hilger*, 43 Ia., 563, cited by counsel for defendant in error, arose. That was an action against a saloon keeper by a wife, for selling liquor to her husband, which caused his intoxication; in which condition he inflicted personal injuries upon her. I quote the entire syllabus of the case in the supreme court:

"The wife cannot recover damages from the seller of intoxicating liquors for injuries committed by her husband upon herself while he was intoxicated, if she has contributed to his intoxication by purchasing the liquors or uniting with him in drinking them."

But the provisions of the statutes of the above states fall far short of those of our own state, both in letter and spirit; and the above cases furnish no light for the interpretation of our statute. We must therefore resort to the language of our statute itself, not only of the section declaring and fixing the liability, but of other sections of the same act, which seem to illumine the intent and purpose of the legislature, and also to those rules of construction which are of universal approval.

It will not be denied, nor can it be, that the language of the statute is broad enough to cover the damage which the willing purchaser of intoxicating liquors may sustain by reason of their use. He is embraced within the mean-

ing of the word "individuals," and there is nothing in the section, nor in the entire act, to indicate a purpose, on the part of the framers of the law, to limit the meaning of that word within narrower bounds than those of its general and popular acceptation. There is, it must be admitted, great force in the argument of counsel for defendants in error, drawn from the cases cited, to the effect that the remedy by suit for damages attributed to the traffic in intoxicating liquors, is limited to those sufferers who are not moving parties or participants in the wrong that causes the injury complained of. But an examination of other provisions of the act will, I think, show that such a restriction was not in the mind of the legislature when framing or passing the act. The section above quoted makes the vendor liable to pay two classes of damages, one those of individuals, the other those of the community. If a willing and consenting individual shall be excepted from the provision, why not a willing and consenting community? The word community here evidently means the organized community—the organizations of the community charged with the duty of supporting the poor, the preservation of the peace and the execution of the laws.

Under the provisions of section 17 of the act, whenever any person shall become a county or city charge by reason of intemperance, a suit may be instituted by the proper authorities on the bond of any person licensed under the provisions of the said act, who may have been in the habit of selling or giving intoxicating liquors to the person so becoming a public charge, although in all such cases the community, the county, or city, has given a willing consent to the sale of the liquors which have wrought the injury. Not only so, but has received a valuable consideration for such consent. I am unable to make a distinction between the case of the willing and the consenting individual and that of the, at least, equally willing and consenting community.

Looking then to the intent of the legislature, as indicated by the language used in these several sections, I find no warrant for denying the remedy by action to the individual who has called and paid for the liquors which have caused the injury directly to himself.

While I do not conceive that the conclusion above drawn would suffer from the application of the strictest rule of construction, yet I do not think the rule of the English courts, and which once prevailed in this country, that statutes which alter common law remedies or affect common law rights must be strictly complied with, as prevailing with us at this day.

Mr. Sedgwick, in his work on the construction of constitutional and statutory law, after discussing this question, as well in the light of reason as of the authorities, at page 274 says, "It would appear, therefore, that the doctrine that statutes in derogation of the common law are to be strictly construed, has now no foundation in our jurisprudence." The same author defines a remedial act to be one of those "made from time to time to supply defects in the existing law, whether arising from the inevitable imperfection of human legislation, from change of circumstances, from mistake, or any other cause," p. 32; and at page 309, he quotes from Dwarria, "that the words of a remedial statute are to be construed largely and beneficially, so as to suppress the mischief and advance the remedy." He also cites the case of *St. Peters, York, Dean and Ch. v. Middleborough*, 2 Y. & J., 196, to the effect that "It is by no means unusual in construing a remedial statute to extend the enacting words beyond their natural import and effect in order to include cases within the same mischief."

It cannot be doubted that the statute which we are considering comes within the class of remedial statutes, nor that under the above authorities we have ample warrant, were it necessary, for giving it the most liberal construction in the interest of justice and humanity.

Buckmaster v. McElroy.

I conclude, therefore, that the petition demurred to in this case, states a cause of action in the plaintiff against the defendants, and that the demurrer was erroneously sustained.

The judgment of the district court is reversed, the demurrer overruled, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

MAXWELL, CH. J., concurs.

REESE, J., dissenting:

I cannot agree to the conclusion reached in this case by the majority of the court. I do not believe it was the intention of the legislature to create a liability in favor of any person who by his own voluntary act contributed to, and in fact caused the injury complained of. While I am in favor of the enactment of such laws as will reduce the evils growing out of the traffic in intoxicating liquors to a minimum, or to destroy them altogether, yet I do not believe a law has yet been enacted which permits an individual, by his own wrong, to create a liability in favor of himself and against those participating with him in the wrong.

30 566
22 496
32 519
24 64

SAMUEL H. BONNS, PLAINTIFF IN ERROR, V. WILLIAM
H. CARTER, DEFENDANT IN ERROR.

30 566
30 682
31 537

30 566
33 875
30 566
34 713

20 566
36 48
37 820

20 566
39 13

20 566
40 768
41 37
41 71

20 566
44 868

20 566
48 56

Assignment for Creditors. An instrument in writing, claiming to be a chattel mortgage, executed by H. to B., whereby H. bargained and sold to B., as trustee for R. F. & M., H. F., R. M. & F., S. J. & Co., J. M. P., J. J. B., and W. L. P., all of his dry goods, clothing, hats, caps, notions, &c., together with all book accounts, &c., and containing the proviso and condition that if the said H. "shall pay to said B., trustee, or his assigns, his seven promissory notes of even date herewith, as follows, to-wit, (giving a description of seven notes payable to the above-named parties and firms, respectively)," and I, the said B. C. Hamilton, authorize the said S. H. Bonns to take immediate possession of the same, and to sell the said property in the usual course of business, at retail and private vendue, and apply the proceeds of the sales thereof to the payment of the said notes in *pro rata* proportion as the same may become due. The balance of the proceeds * * * to be paid or returned to the said B. C. Hamilton or his assigns, immediately upon the said notes being so paid," etc., *Held*, To be an assignment for the benefit of creditors; and not being made in conformity to the terms of the chapter of the Compiled Statutes entitled "assignments," further *Held*, To be void as against creditors.

ERROR to the district court for Cherry county. Tried below before TIFFANY, J.

Holmes & White, and *George B. Lake*, for plaintiff in error.

E. F. Gray, for defendant in error.

COBB, J.

This was an action of replevin commenced by Samuel H. Bonns against William H. Carter, sheriff of Cherry county. The property replevied consisted of a stock of merchandise formerly owned by, and in the possession of, B. C. Hamilton, but which had been conveyed by him to

Samuel H. Bonns by an instrument claimed to be a chattel mortgage, and which had been afterwards levied upon and taken from the possession of said Bonns by the said sheriff, upon an order of attachment issued in an action pending against Hamilton, and in favor of one of his creditors. The order in replevin was served by the coroner of the county, and the property delivered to the plaintiff, he giving bond and security therefor as required by law.

The defendant's answer consists of a general denial. There was a trial to a jury, with a verdict for the defendant, and judgment for a return of the property replevied, or if a return thereof could not be had, that defendant recover of the plaintiff the sum of \$1129.50 (the amount of his judgment against Hamilton), and costs of suit. The plaintiff brings the cause to this court on error, and assigns the following errors:

"First. That the court erred in refusing to give the first instruction requested to be given to the jury on behalf of the said plaintiff.

"Second. The court erred in refusing the second instruction to the jury requested on behalf of said plaintiff.

"Third. The court below erred in refusing to give to the jury the third instruction requested on behalf of the said plaintiff.

"Fourth. The court erred in refusing to give to the jury the fourth instruction requested on behalf of the said plaintiff.

"Fifth. The court below erred in the instruction given to the jury.

"Sixth. The court erred in holding and adjudging that the mortgage referred to in the instruction to the jury was in law 'an assignment for the benefit of creditors, and as such void under our statute.'

"Seventh. The court erred in directing the jury as to what sort of verdict they should return."

At the trial the following proceedings were had :

" Plaintiff being sworn, testified that he was employed as traveling salesman for Rice, Friedman & Markwell, of Chicago, dealers in gents' furnishing goods; that 19th or 20th of January, 1885, he went to Valentine for the purpose of collecting an amount due from B. C. Hamilton to his said employers. Hamilton, being unable to pay, plaintiff, together with Messrs. Curran and Spencer, representing respectively Steele, Johnson & Co., and Reid, Murdoch & Fischer, creditors of Hamilton, demanded of him security for the amounts due their employers, and procured from him a chattel mortgage on his (Hamilton's) stock of goods.

" That said mortgage was also given to secure amounts owing by Hamilton to J. M. Phillips, W. L. Parrotte & Co., J. J. Brown & Co., and Henry Fuhrman, Parrotte & Brown being represented by H. R. Bisbee, an attorney residing at Valentine.

" That immediately upon the execution of the mortgage, plaintiff entered into possession of the stock and continued in possession thereof continuously till interrupted by the levy by defendant of a writ of attachment upon the portion of said stock which is in controversy in this action, and that the proceeds of the sales of goods from said stock were under the provisions of the mortgage applied to the part payment of the two debts secured by such mortgage, which were then due. Plaintiff also offered in evidence a copy of the mortgage under which he held the property which copy is 'Ex. A' attached to bill of exceptions."

The defendant objected to the introduction of the same in evidence as incompetent and immaterial, and because the instrument on its face is void, as being in violation of our assignment law for the benefit of creditors, and as being also in violation of section 17 of our statute of frauds, and it appearing on its face to be made with intent to hinder and delay creditors, which objection was overruled, and the paper received in evidence.

"H. R. Bisbee testified on the part of the plaintiff, that at the time of the execution of the mortgage in evidence he acted as attorney for Parrote & Co. and J. J. Brown & Co., who were secured thereby, and accepted for them the security thus given.

"D. A. Holmes testified on behalf of plaintiff, that at the time of the execution of the mortgage in evidence he acted as attorney for Rice, Friedman & Markwell, and Reid, Murdoch & Fischer, and a few days subsequently was employed by J. M. Phillips to look after his interests in connection therewith, and instructed by said Phillips that its terms were satisfactory. Whereupon the plaintiff rested his case.

"Charles H. Cornell testified on the part of the defendant, that at the time of the execution of the mortgage in evidence he held for collection at the Bank of Valentine a draft for \$325.00, drawn by the Consolidated Tank Line Co. on Hamilton & Gillett, and that Mr. Hamilton did not offer to secure the same in said mortgage.

"Henry Fuhrman testified on behalf of the defendant, that on the 20th day of January, 1885, he was a creditor of B. C. Hamilton to the amount of \$1091.00, \$550 of which was due. That shortly prior to said time he had sent Hamilton a statement of said amount due. That an attachment proceeding was commenced January 23d to recover the full amount of said claim. That he had no knowledge at that time of his claim or a part thereof being secured by the mortgage in evidence, and did not accept such security, he being in New York at that time.

"M. P. Kinkaid testified on the part of the defendant that about February 1st, 1885, he went to Valentine, and after making inquiries as to the property of B. C. Hamilton, 'found nothing practically available to creditors except the stock of goods covered by the mortgage to S. H. Bonns'. Defendant also offered in evidence a mortgage on same stock executed by B. C. Hamilton January 28, 1885,

in favor of other creditors, a copy of which is 'Ex. B' attached to bill of exceptions.

"Also an assignment by S. H. Bonns to Henry A. Thompson of first mortgage, the same bearing date January 28, a copy of which is attached to bill of exceptions marked 'C.'

"It was then admitted by plaintiff, that January 28, Henry Fuhrman commenced suit against Hamilton and caused to be attached the property in controversy by the defendant sheriff, that due and legal service was had and judgment rendered for \$1,112.00 and \$17.50 costs in favor of said Henry Fuhrman, and an order for the sale of the property attached was made, and that the attached property was appraised at \$1,151.75.

"Whereupon defendant rested his case.

"H. R. Bisbee testified on behalf of plaintiff that he acted for certain of the creditors secured by second mortgage executed January 28, that the same was executed at his solicitation for the purpose of securing said claims. That he knew of other indebtedness owing by Hamilton not secured by either mortgage. That Hamilton never to his knowledge volunteered the execution of either mortgage or any other any instrument to secure creditors.

"S. H. Bonns testified that he delivered possession of the Hamilton stock to Henry A. Thompson, January 28, upon written request of J. J. Brown & Co., D. M. Steele & Co., J. M. Phillips, and W. L. Parrotte & Co., creditors, secured by the mortgage 'Ex. A,' which requests in writing are attached to bill of exceptions marked 'D,' 'E,' and 'F.'

"D. A. Holmes testified that 'Ex. A' was not volunteered by Hamilton, but was obtained by him with difficulty as security for the creditors represented by him. That Fuhrman and Phillips, who were not represented at that time, were secured at Hamilton's request, he stating that 'they had used him white,' and would not give a

chattel mortgage unless their claims were secured thereby. That witness knew nothing about the amount of Hamilton's other indebtedness.

"J. A. Sparks testified that Hamilton held the building and lot occupied by him as store, under a contract for deed, on which \$250 had been paid, and that the contract had been recorded with county clerk. And that improvements had been made by him on the property.

"Chas. W. Gillette testified that Hamilton was a single man.

"Defendant admits that the improvements made by Hamilton on the store property were of the value of \$200.

"After evidence submitted the plaintiff asked the court to instruct the jury as follows:

"1. You are instructed that if at the time the attachment of Henry Fuhrman was levied upon the goods in controversy, the same were in the possession of the plaintiff holding them by virtue of the chattel mortgage first in evidence, and that said mortgage was taken by the creditors represented by the plaintiff in good faith for the purpose of securing an actual indebtedness due them, and that the plaintiff and the creditors for whom he acted had no intention of hindering, delaying, or defrauding other creditors of B. C. Hamilton, except in so far as the execution of such mortgage and the taking possession of the property mortgaged herein would of necessity hinder and delay them, at the time of the execution of said mortgage and during the time he had possession of the stock, before the levy of said attachment, your verdict will be for the plaintiff.

"2. You are instructed that to constitute this mortgage fraudulent there must have been existing in the mind of B. C. Hamilton, when he executed the same, an intent to defraud, hinder, or delay his creditors, or at least Henry Fuhrman, the attaching creditor, which intent must have been participated in by the plaintiff. And unless the

mortgage was executed in contemplation of the insolvency of B. C. Hamilton, and for the purpose of preventing the property therein conveyed from being distributed under the laws relating to insolvency or to defeat the object of said law or hinder or impede its effect, or to evade the same, which facts were known to the plaintiff or the parties for whom he acted, and within thirty days thereafter said Hamilton made a voluntary assignment under the provisions of said law, said mortgage is not fraudulent as being in conflict with the statutes of this state regulating assignments for the benefit of creditors.

"3. You are instructed that if the mortgage under which the plaintiff had possession of the property in controversy was not fraudulent upon its face, and possession was taken immediately upon the execution thereof by the mortgagee, then the burden of proof is upon the defendant to establish fraud upon the part of the plaintiff in connection with the same; and unless the defendant has shown by a preponderance of evidence that the plaintiff in procuring such mortgage did so with intent to defraud the creditors of Hamilton, your verdict will be for the plaintiff.

"4. You are instructed that a debtor has a legal right to secure one or more of his creditors by mortgage or sale of any or all of his property to the exclusion of all other creditors, providing he does not within thirty days thereafter seek to take advantage of the insolvent law by making an assignment for the benefit of his creditors as provided therein; and that unless such assignment be so made, the fact that other creditors are prevented by such mortgage or sale from collecting their demands, does not raise a presumption of fraud in the execution of such mortgage or the making of such sale.

"Which the court refused to give, to which ruling plaintiff excepted.

"The court then charged the jury as follows:

"You are instructed that the instrument named on the

back a 'mortgage,' dated January 20, 1885, and in evidence called in the trial the 'first instrument,' is an assignment for the benefit of creditors, and as such void under our statute, and conveys no title to the plaintiff in this action as against other creditors. Therefore it is your duty to sign by your foreman the verdict herewith handed you, just as it is drawn, and you are ordered by the court to sign this verdict by your foreman and return the same to the court."

The following is the instrument given in evidence by the plaintiff and marked exhibit "A":

"Know all men by these presents, That I, B. C. Hamilton, of Valentine, Cherry county, Nebraska, for and in consideration of the sum of one dollar in hand paid, and the further sum of four thousand three hundred and ninety and $\frac{4}{100}$ dollars, as represented by the seven promissory notes of the said B. C. Hamilton, executed in favor of the parties hereinafter named, in amounts as hereinafter specified, have bargained and sold, and by these presents do grant, bargain, sell and convey unto Samuel H. Bonns, trustee for Rice, Friedman & Markwell, Henry Fuhrman, Reid, Murdoch & Fischer, Steele, Johnson & Co., J. M. Phillips, J. J. Brown, and W. L. Parrotte, the following goods and chattels, to-wit: All his stock of dry goods, clothing, hats, caps, boots, shoes, notions, furnishing goods, groceries, queensware, glassware, tobacco and cigars, wooden and willow ware, together with all furniture, fixtures and articles now contained in and kept for sale in his store in Valentine, Nebraska, together with all book accounts now due me as evidenced by my books of accounts; and I hereby covenant to and with the said S. H. Bonns, trustee, that I am lawfully in possession of said property and the same is free from incumbrance, and that I will warrant and defend the same against the lawful claims of all persons whomsoever, provided always, and these presents are upon the express condition, That if the said B. C. Hamilton

shall pay or cause to be paid to said S. H. Bonns, trustee, or his assigns, his seven promissory notes of even date herewith, as follows, to-wit: One for six hundred and eighty-three and $\frac{54}{100}$ dollars due, one day after date in favor of Rice, Friedman & Markwell; one for seven hundred and ninety-five dollars, due one day after date in favor of Steele, Johnson & Co.; one for one hundred and twenty-five and $\frac{11}{100}$ dollars, due January 29, 1885, in favor of Reid, Murdoch & Fisher; one for eight hundred and ninety and $\frac{28}{100}$ dollars, due February 1st, 1885, in favor of Henry Fuhrman; one for nine hundred and thirty-two dollars, due February 15, 1885, in favor of J. M. Phillips; one for three hundred and fourteen and $\frac{24}{100}$ dollars, due in favor of W. L. Parrotte; one for six hundred and fifty-four and $\frac{2}{100}$ dollars, due February 10, 1885, in favor of J. J. Brown, with interest according to the tenor thereof, then these presents to be void. And I, the said B. C. Hamilton, hereby authorize the said S. H. Bonns to take immediate possession of the same, and to sell the said property in the usual course of business at retail and private vendue, and apply the proceeds of the sales thereof to the payment of the said notes in *pro rata* proportion as the same may become due. The balance of the proceeds of the sales thereof, and of goods and chattels remaining after paying all reasonable expenses connected with the taking and selling of said property, if any there be, to be paid or returned to the said B. C. Hamilton or his assigns immediately upon the said notes being so paid. The said Samuel H. Bonns hereby agreeing to take the property herein before mentioned and sell the same according to the terms hereof, and from time to time, as may be necessary in order to an expeditious sale of said property, replenish from the proceeds of such sales said stock by purchasing for cash such staple goods as may keep the stock saleable until the said notes are fully paid.

Bonns v. Carter.

"In testimony whereof I have hereunto set my hand this 20th day of January, A.D., 1885.

"B. C. HAMILTON.

"Witness, D. A. HOLMES,
" F. P. BUTTERFIELD." }

As the disposition of the case must depend upon the construction to be placed upon the above instrument in the light of the evidence, the substance of which is herein given, it is not deemed necessary to copy the instrument executed by Mr. Hamilton on the 28th day of January, and given in evidence by the defendant.

Upon one point the evidence is not quite as conclusive or satisfactory as could be wished. That is, whether the instrument claimed to be a chattel mortgage covered all of Hamilton's property. However, there is some evidence to the point, from which I think it may be concluded that it did, substantially.

The instrument, as contended by counsel for plaintiff, contains all the elements of a chattel mortgage except that while it contains the usual defeasance clause, to prevent the conversion of the property into money, and its application to the payments of the debts secured in case of their payment by the mortgagor, yet it provides for the taking of the possession of the property immediately and its conversion and application by the trustee therein named, so as to effectively nullify the defeasance clause, as to its usual office when used in a mortgage, and gives it the same effect as when used in a deed of general assignment.

It may be said that in all cases where a mortgagee takes possession of property by virtue of a chattel mortgage, before or for the purpose of foreclosure, he occupies a relation of trust, but this relation applies only to the overplus, or what may remain of the mortgaged chattels after the payment of the mortgagee's debt and the proper costs. But the instrument which we are now considering creates a trust immediately upon its acceptance by the mortgagee,

who is therein named as trustee. This I think is the turning point, more or less sharply defined, in all the cases where instruments, claimed to be mortgages, have been held to be assignments for the benefit of creditors.

The case of *Wallace & Krebs v. Wainwright*, 87 Pa. St., 263, cited by counsel for defendant, was like the case at bar in nearly all essential respects. Wallace & Krebs, attorneys at law, held a large number of claims against John Irvin & Bros. Irvin & Bros. executed a bill of sale to Wallace & Krebs of a large number of judgments and claims as was set out in the instrument in payment of the claims, held by said firm of attorneys. In the action brought by a creditor not provided for in said transaction, said bill of sale was held to be an assignment for the benefit of creditors, and that not having been recorded according to law it was void as against a subsequent attaching creditor. Also in the syllabus the court say: "A trust exists where the legal interest is in one person and the equitable interest in another."

The above case follows numerous other cases of the same state, cited in the opinion, and the principles therein sustained are believed to be well settled.

In the case of *Harkrader v. Leiby*, 4 Ohio State, 602., also cited by counsel for defendant, Daniel Leiby executed a mortgage upon all or nearly all of his property to George, Jacob, and Joseph Leiby, containing the following condition: "Provided, nevertheless, and this deed is on this condition, to-wit: Whereas the said George Leiby, Jacob Leiby, and Joseph Leiby are endorsers and security for the said Daniel Leiby in divers sums of money and debts due and to become due from said Daniel Leiby to divers persons. Now, if the said Daniel Leiby, his heirs and assigns, shall well and truly pay, or caused to be paid, the said debts and sums of money as aforesaid, amounting to about the sum of seven thousand dollars, and shall also pay to Dr. Wampler, John Shafer, Samuel Lucas, Isaac

Gardner, and Aaron Russell, all of Butler county, Ohio, the several sums of money owing by the said Daniel Leiby to them, then these presents shall be void and of no effect, otherwise to be and remain in full force," etc.. This instrument was held to be an assignment for the benefit of all the creditors, as well those not named as those who were. This case is followed in the same court by that of *Dickson v. Rawson*, 5 Id., 218.

In the case of *Page v. Smith*, 24 Wis., 368, also cited by counsel for defendant, Dedolph & Lipke received of Page an advance of \$775, and executed to him a bill of sale (in that state ordinarily regarded as a chattel mortgage) of a lot of staves and heading of the value of \$2,600, "proceeds of the same when sold to be applied to the payment of the said Thomas Page and other creditors." This instrument was held to be an assignment for the benefit of all the creditors of Dedolph & Lipke, and there being no bond given by Page as required by the assignment law of that state, was held to be void, following the much involved case of *Norton v. Kearney*, 10 Id., 386.

In all of these cases, as in the case at bar, there was a trust created by the instrument itself, not dependent upon garnishment or intervention on the part of the beneficiaries therein named.

It is not deemed necessary, for the purposes of this case, to attempt a construction of our assignment law, further than to call attention to those of its provisions which declare all assignments under it to be void unless made in conformity to it, requiring the sheriff of the county to be the assignee named in every case, and forbidding the giving of a preference of one debt or class of debts over another, except that of laborers' wages to the limited amount therein specified. The instrument involved in the case at bar is inimical to all these provisions, and hence cannot be sustained as a valid assignment. Comp. Stat., Ch. 6.

I come to the conclusion, then, that while a debtor may

give a mortgage of a part, possibly of all, of his property, to a creditor to secure his *bona fide* debt, yet if, by the terms of such mortgage, or of a contemporaneous agreement, he seek to create a trust in favor of any other creditor or person in relation to the mortgaged property, such instrument must be held to be an assignment for the benefit of all of such debtor's creditors, and as such must be held void, if not "made in conformity to the terms" of the act regulating voluntary assignments.

It necessarily follows, therefore, that there was no error in the giving or refusing to give instructions by the district court, nor in directing the verdict as stated in the record.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED

THE other judges concur.

HERBERT C. JOINER, PLAINTIFF IN ERROR, V. WILLIAM
L. VAN ALSTYNE ET AL., DEFENDANTS IN ERROR.

1. **Bill of Exceptions.** Affidavits, used as evidence, upon the hearing of a motion in the district court, will not be considered in the supreme court unless preserved as a part of the record by a bill of exceptions.
2. **Motion for a New Trial.** To entitle a party to a review of any alleged errors transpiring upon the trial of a cause, a motion for a new trial must be made distinctly setting forth the errors complained of. *Cropey v. Wigenhorn*, 3 Neb., 108.

ERROR to the district court for Lancaster county. Heard below before MITCHELL, J.

Joiner v. Van Alstyne.

Dikworth, Smith & Dikworth and *A. H. Bowen*, for plaintiff in error.

C. O. Whedon, for defendant in error, Doolittle.

REESE, J.

This is a proceeding in error to the district court of Lancaster county. The cause was tried to the court and resulted in a finding in favor of defendant in error. The decree was rendered April 14th, 1885. On the 29th day of December, 1885, plaintiff in error filed a motion and affidavit for leave to file a motion for a new trial. This motion was overruled. It is sought to have this ruling reviewed by this court, but as the evidence presented with the motion has not been preserved by the proper bill of exceptions, we cannot review the decision of the district court.

This leaves the case without a motion for a new trial having been made in the trial court. The cause cannot be reviewed on error in the absence of such motion. *Cropsey v. Wigenhorn*, 3 Neb. 108. *Wells, Fargo & Co. v. Preston*, Id. 444.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

20 580
23 593**FIRST NATIONAL BANK OF CEDAR RAPIDS, IOWA, PLAINTIFF IN ERROR, v. E. V. ERICKSON, DEFENDANT IN ERROR.**

1. **Warranty: ADMISSIBILITY IN EVIDENCE.** A defense was founded upon a certain printed warranty alleged to have been delivered to defendant by plaintiff's assignor at the time of the execution of the notes sued on. The execution and delivery of this warranty was denied by plaintiff. Defendant testified in substance that the warranty was delivered to, and received and relied upon by him as such, *Held*, Sufficient *prima facie* to permit the introduction of the instrument in evidence. The denial of the delivery of the warranty by plaintiff's witnesses presented a question of fact to be decided by the jury.
2. ———: **CONDITIONS.** The delivery of a printed warranty of the quality of a harvester—with the name of the warrantor printed thereon as a signature—by an agent authorized to deliver the same, if delivered for and received as a warranty of the quality of a machine sold, being relied upon by the purchaser to the knowledge of the seller, would be binding as such warranty, even though upon the margin thereof there is a condition printed that it shall be "void unless countersigned by * * * agent," and no agent has countersigned it.
3. ———. **EVIDENCE** examined and *Held*, Sufficient to sustain a finding of breach of warranty, and of a waiver of the right to have return of the property within a specified time in case it did not give satisfaction.
4. **Evidence: BONA FIDE PURCHASER.** Under the evidence, plaintiff *Held* not to be an innocent purchaser of the notes upon which the suit was brought.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Harwood, Ames & Kelly, for plaintiff in error.

W. B. Baird, for defendant in error.

REESE, J.

This was an action on two promissory notes executed by defendant in error to the Williams Harvester Company,

and by it transferred to plaintiff in error. The petition is in the usual form, and declares the plaintiff in the action to be a *bona fide* holder, having purchased the notes for value before maturity, etc.

The answer admits the execution of the notes, and alleges that they were executed as and for a part of the purchase price of a Williams harvester and binder combined, and which said machine was sold to defendant upon a warranty in writing, signed by the Williams Harvester Company. This warranty is set out in the answer, and is as follows:

"This machine is warranted to be of good material and well made, and if a combined machine and properly operated with two horses and a driver, will cut from ten to fifteen acres of grass or grain per day, and will do it as well as any other combined machine. If single, and properly operated with two horses and a driver, will cut as many acres of grass per day, and any kind of grass, as well as any single mower of equal capacity. If a harvester, and properly operated with two horses and a driver, and two binders, will cut from ten to twelve acres of grain per day, as well as any other harvester of the same capacity. If a harvester and binder, and properly operated, it will draw as light, cut and bind as much grain, and do it as well as any other harvester and binder of equal capacity.

"THE WILLIAMS HARVESTER CO.,

"Cedar Rapids, Iowa."

This warranty is all printed, including the signature. It is attached to a blank order for a machine. Between the two, and below the place designed for the signature of the purchaser, is the following:

"(Remove this warranty and give it to the purchaser:)"

".....read this warranty, which we give with each machine sold.

".....not valid unless countersigned by
....., agent."

There are no other blanks for signatures or otherwise, in connection with the warranty.

It is further alleged in the answer that another note had been executed and paid by defendant, the amount thereof being \$104, and that defendant would not have made such payment "had not the said Harvester Company agreed to keep said warranty and agreement in all respects; and also again did the said Harvester Company make an additional warranty in writing * * to put said machine—harvester and binder—in good shape before the harvest of 1883, by putting on a new knotter and movable binder and put the machine in good order." That as soon as defendant discovered that said machine and binder was not of good quality and did not comply with said warranties and agreements, he notified the agents of the Harvester Company, and offered to return said harvester and binder, and in the year 1888 he left it with said agents, who yet have it.

It is alleged that the harvester and binder failed in all respects to perform as warranted, that it was not made of good material, and that the consideration of the notes had failed. Another allegation is that "plaintiff purchased said note in bad faith, and not in the ordinary course of business, and after the maturity of said notes, and well knew the defenses the defendant had to the same." The reply consisted of a general denial. There was a jury trial, which resulted in a verdict and judgment in favor of defendant. Plaintiff alleges error.

The first question to which our attention should be given is the alleged error in the ruling of the trial court in the admission of the warranty referred to, as evidence. The answer alleges that the machine was sold to defendant on the warranty, and defendant testified that it was delivered to him about the time of the sale, and before the execution of the notes, and that at the time he gave the notes he was asked by the person to whom they were given, if he did not have the warranty, and on producing it he was directed to keep it, that it was sufficient. So far as his testimony goes, although given in broken English, and in some re-

spects quite unsatisfactory, it is clear that he relied on this warranty, and kept it as such with the knowledge of the agents of the Harvester Company. So far, therefore, as the delivery of the instrument and its recognition as a warranty are concerned, there was sufficient to justify the court in its admission as evidence. It is true that the witnesses for plaintiff contradicted the statements of defendant in almost every particular with reference to the delivery or recognition of the paper as a warranty, but that presented a question of fact for the jury to decide. There was enough, *prima facie*, to warrant the admission of the instrument.

It is insisted that the paper had no legal force as a warranty because of the partial memorandum, ".....not valid unless countersigned by agent." This memorandum is very imperfect and may admit of some doubt as to just what is meant by it. But this much is evident, that if that instrument was delivered to defendant, as and for a warranty of the machine purchased by him, as he testified it was, and afterwards re-affirmed as such when he called for a warranty, as he testifies, and that the notes were given with such reliance on his part, and of which the agent had knowledge, the Harvester Company was as firmly bound by the warranty as if had been countersigned by its agent in full accordance with the alleged requirements of the memorandum. Or, stated differently, if the paper was delivered with the machine, or in connection with the contract of sale so as to become a part thereof, and was intended as and received for a warranty according to its terms, then being so received, with the knowledge of the Harvester Company, it would, as between the parties to the contract, to all intents and purposes be as valid as though fully filled up and signed by the Harvester Company, and the company or any one claiming under it with notice, would be estopped to deny its binding force. Therefore the question as to whether it was so given and received, was one of fact for the jury to determine. It will not do to

say there was no evidence upon this issue to submit to the jury. In addition to the testimony of defendant as to such delivery and recognition, the warranty is found in his possession, of the kind issued by the Harvester Company, and furnished its agents for the purpose of delivering to the purchasers of machines. The probabilities are in favor of the truth of defendant's testimony.

It is insisted that if there was sufficient proof of a warranty, still there was not sufficient proof of a breach. It is shown by the abstract that defendant testified in substance that the harvester would not work; it would not bind, particularly so when the grain was damp in the morning or evening from dew. That it wore out the knotters or binders; that the machine was not constructed of good material, and that it did not have sufficient motion. That the draft was heavy, and that it required more than three horses; that it did not cut well, and that it would not bind well. In addition to this testimony Lewis Helmer testified that the machine would sometimes go for ten and sometimes twenty rods and not bind a sheaf; that the grain was bound very poorly and was delivered upon the ground in a worse condition than if no effort had been made to bind it. Charles Hermance also testified that he saw the machine in the year 1888 in the field, and an effort was being made to use it. That it would not work at all. That it would neither bind nor elevate the grain; it would clog up so that they would have to stop every few feet.

This testimony, if believed by the jury, would be sufficient to warrant them in finding a breach of the warranty, if one had been given. These questions of fact were for the jury to determine.

It is said that defendant, having failed to rescind the contract as soon as the alleged defects were discovered, is now deprived of the defense which he seeks to make. That he not only failed to rescind but waived his right to do so. This contention is based, in part at least, upon the

proof that on the day the machine was tried in Helmer's grain, time was given until the next day at noon, in which defendant could further test it, and in case of failure to perform it might be returned. As to who should "haul it back" the evidence is not clear, but from the testimony of defendant on his cross-examination in answer to a question by plaintiff's counsel, it is made to appear that it was the Harvester Company's duty to return the machine. But this inquiry is not material, as it was insisted by defendant, and he so testified, that by subsequent agreements this contract was rescinded—that the warranty was recognized—and various efforts were made by the Harvester Company, even as late as the year 1883, to make the machine perform. Furthermore, it is alleged that an additional warranty was made in 1883. This instrument is set out in defendant's abstract, and while it cannot properly be called a warranty, it is an agreement to put the harvester and binder "in good shape on or before the harvest of 1883, * * * by putting on a new knotter and movable binder, and put the machine in good order." It is dated March, 14, 1883. This is only one of the circumstances relied upon by defendant to show that the warranty of 1882 was recognized as in force, and that the machine had failed to fill the measure of such warranty.

The Harvester Company waived the right to have the machine returned the next day after its delivery, if not satisfactory, if such right ever existed.

It is claimed that plaintiff is a *bona fide* purchaser of the notes in suit, for value before maturity, and that it is therefore protected in its purchase and entitled to judgment on that ground. On the trial it was admitted of record "that the assistant cashier of plaintiff, The First National Bank of Cedar Rapids, Iowa, was the treasurer of the Williams Harvester Company, and that the president of the one company was the president of the other at the time of the purchase of the notes by plaintiff."

This condition would be enough to put plaintiff on inquiry at least, and we think would charge it with full notice of the defense of defendant. The jury may have found that the machine was constructed of bad material, and it evidently did find that it was not properly constructed. They also found by their verdict that the warranty was made as alleged. It is beyond question that it was the purpose and intention of the Harvester Company that this particular warranty should be given with the machine when sold. The officers of the plaintiff in error had full knowledge of all of these facts if they existed. The notes were purchased by its agents, the president and cashier, with this knowledge. The knowledge of an agent is the knowledge of the principal. Wade on Notice, § 672. Plaintiff was not an innocent purchaser, and the defense is available against it. *Id.*, § 675, *et seq.* Civil Code, § 31.

It is contended that the jury ignored certain instructions given them on plaintiff's request. These instructions submitted questions of fact upon which the jury found against plaintiff and which have been sufficiently noticed in the foregoing.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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JOHN T. LANE, PLAINTIFF IN ERROR, V. JACOB STARKEY, DEFENDANT IN ERROR.

1. *Res adjudicata*: LAW OF THE CASE. The rule stated in *Hiatt v. Brooks*, 17 Neb., 33, "that a previous ruling by an appellate court upon a point distinctly made is a final adjudication, from the consequences of which the court cannot depart nor the parties relieve themselves," is applicable only to legal prin-

Lane v. Starkey.

ciples enunciated and rules of law laid down for the government of the inferior court upon the second trial. It has no reference to decisions on questions of fact solely where the evidence upon the second trial is materially different from that on the first.

2. Evidence examined and *Held* to sustain the verdict.

ERROR to the district court for Saline county. Tried below before BROADY, J, sitting for MORRIS, J. .

Ryan Brothers, for plaintiff in error.

Hastings & McGintie, for defendant in error.

REESE, J.

This is a proceeding in error to the district court of Saline county. The cause was before this court at the July, 1883, term, and the decision is reported in 15 Neb., at page 285. The judgment of the district court was reversed and a new trial awarded. Another trial was had, which resulted in a verdict similar to the first, and the case is again presented by plaintiff in error for review.

There are three assignments of error. 1st. The district court erred in overruling the motion filed for judgment on the evidence, notwithstanding the verdict; 2d. The court erred in overruling the motion for a new trial; and, 3d. The court erred in entering judgment on the verdict rendered.

The first of these assignments is not now urged, and, as the same questions arise on the consideration of the second and third, it will not be further noticed.

The second and third assignments will be considered together, as they present the same question. It will thus be seen that no question of law arising on the trial is involved in the consideration of the case. The only vital question is, whether or not the verdict of the jury is sustained by the evidence.

It is insisted by plaintiff in error that the rule stated in *Hiatt v. Brooks*, 17 Neb., 33, that a previous ruling by this court in a case "upon a point distinctly made is a final adjudication, from the consequences of which the court cannot depart nor the parties relieve themselves," must be here applied, and that, by that holding, plaintiff in error is entitled to a new trial. We do not so understand the application of that rule. So far as the enunciation of any legal principle is involved which is common to both cases, the rule must be applied; but wherein the decision was upon questions of fact alone, as developed by the testimony upon the first trial, they can apply only to that case; and the testimony in this case—or rather in this stage of the case—being, in many respects, different from the testimony taken on the first trial, the case is before us to be decided upon its merits, uninfluenced by any conclusion of fact on the former hearing.

As we have frequently held, where the contention is that the verdict is contrary to the evidence, if the testimony is conflicting, we cannot enter into a minute discussion of the testimony offered by either side, and carefully weigh the statements of witnesses and the probabilities of the truth of their testimony. This is the special province of the jury, and with that part of their labor we cannot interfere. If the verdict is so clearly and manifestly wrong as to challenge the attention of a disinterested mind and firmly impress upon it the conviction that the jury have lost sight of their province as triers of fact, and have heedlessly ignored the clear and palpable weight of the evidence, then, and only then, is it the duty of a reviewing court to interfere. This rule extends with its full force only to cases where the testimony is conflicting. Applying it to the case at bar, we do not hesitate to say that the verdict must be upheld and the judgment of the district court sustained.

A general statement of the facts need not be here made, as they are substantially as stated in the opinion of the ma-

jority of the court and the dissenting opinion of Chief Justice LAKE above referred to, with the exception, among others, that on the last trial it was fully shown that the notes executed by Stone to Woodruff had been transferred by him—principally to creditors—and paid in full by Stone, and that the notes executed by defendant in error to Stone had been paid. Without stopping to consider the *bona fides* of Stone and Woodruff in the transaction between them, or even of Stone in the transaction between himself and defendant in error, we think there was sufficient to warrant the jury in finding that in the purchase from Stone defendant in error acted in good faith. Even Woodruff himself, a not unwilling witness for plaintiff in error, and who was present in and about the store until after Starkey's purchase, says, "I never had any conversation with Starkey before he bought the goods; to my knowledge, he knew nothing of the arrangement between me and Stone." There is no proof that he did. It is true that his relations with Stone had been such as might be consistent with such knowledge, but not such as would raise a conclusive presumption of its existence. He was in possession of the property at the time of the levy. That possession was, *prima facie*, proof of ownership. The possession was also notice to plaintiff in error of his rights. Plaintiff in error admits the possession and seizure under the circumstances as alleged, but says that possession was fraudulent. While it is true that the presumption arising from possession is subject to all the surrounding circumstances and conditions attending the possession and the manner in which the possession was acquired, yet, in the first instance, the burden is upon the party alleging fraud to prove it, as fraud will not be presumed.

All the circumstances attending the alleged purchase and possession were before the jury, many of them are not inconsistent with good faith. Among those that are claimed to be such is the fact, as testified to by defendant in error,

that after the levy by plaintiff in error, defendant in error went to Stone and desired to rescind the contract, and that Stone declined to do so, but directed the suit to be brought and agreed to pay the expense of its prosecution. It can be readily seen that the suggestion on the part of defendant in error might have been made from pure motives and with no other intent than to avoid litigation. He had purchased the property of Stone, and within three days thereafter the title was questioned and the property was levied on to satisfy Woodruff's debts. It would be quite reasonable for him to desire to be freed from the trouble and annoyance which he had apparently purchased. The course pursued by Stone could have but little bearing in any way. If he was acting in good faith in the sale he might be held as a warrantor of the title to the property, and could just as well assert the right adverse to the creditors of Woodruff in this action as in one of his own. A suit on behalf of defendant in error would perhaps afford the easiest and quickest solution of conflicting claims. He was, in effect, notified by Starkey of the attack upon his title, and it would seem to be the part of wisdom, in any view of the case, for him to avail himself of the first opportunity to assert his right to dispose of the property. These considerations were for the jury, and their finding thereon will have to stand. The testimony of Whitcomb and VanSlyck (witnesses for plaintiff in error), if uncontradicted and believed by the jury, would go far to show the bad faith of Stone and so impeach his testimony as to render it of but little value; but we are informed by plaintiff's abstract that Stone, while on the stand, "*seriatim* denied knowledge of and in some instances as a fact each matter testified to by Lorenzo P. VanSlyck. He also denied each matter testified to by Edward Whitcomb, as hereinafter fully stated." From this it appears that there was a direct conflict, and from the finding, we conclude the jury believed Stone.

The price actually paid for the goods by defendant in

Arnett v. Zinn.

error was \$2,500. The amount of the invoice, at cost with carriage added, was between twenty-seven and twenty-eight hundred dollars. The difference between the amount paid and the value of the property was not such as to raise a presumption of fraud. There is no complaint that the questions of fact involved in the case were not fairly submitted to the jury. Their decision thereon under the evidence must be final.

The judgment is affirmed.

JUDGMENT AFFIRMED:

THE other judges concur.

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| 39 | 348 |

**FANNY ARNETT, PLAINTIFF IN ERROR, v. WILLIAM
ZINN, DEFENDANT IN ERROR.**

1. **Limitation of Actions.** Where there is no continuing trust and money received by an agent is not to be paid at a date later than its receipt, the statute of limitations will run in his favor from the time he received such money.
2. ———. To be valid under the statute, a promise to pay a debt barred by the statute of limitations, must be in writing.

ERROR to the district court for Fillmore county. Tried below before MORRIS, J.

J. W. Eller and W. T. Sloan, for plaintiff in error.

J. Jensen and Ryan Brothers, for defendant in error.

MAXWELL, CH. J.

This action was brought in the district court of Fillmore county to recover the sum of \$1,075, with interest thereon

from Febry 1, 1882. A demurrer to the petition was sustained in the court below and the action dismissed.

The following is a copy of the petition :

"Said plaintiff, Fanny Arnett, complains of said defendant, William Zinn, for that said defendant was, on or about the ... day of married to the mother of plaintiff, whose name before said marriage was Mariah L. Arnett.

"That plaintiff was the daughter of said Mariah L. Arnett by her first husband, and the only child of her mother.

"That by said marriage the mother of said plaintiff became and was Maria L. Zinn.

"That for a long time prior to and at the time of the marriage of plaintiff's mother to defendant, William Zinn, her said mother was the owner of certain real estate in the county of Gentry, state of Missouri, to-wit: The west half of the south-east quarter and the north-east quarter of the south-west quarter of section No. 20, in township 63, of range 30, except one acre out of the north-east corner of the last described parcel of said tract of land, containing about one hundred and nineteen acres.

"That on or about the 1st of February, 1882, said Maria L. Zinn sold said tract of land and realized therefor the sum of one thousand and seventy-five dollars.

"That in the negotiating and sale of said real estate, said defendant acted as the agent of said Maria L. Zinn and received the money and other consideration therefor and never paid the same, or any part thereof, to said Maria L. Zinn.

"That said Maria L. Zinn died intestate, in Fillmore county, Nebraska, on the 14th day of November, 1883.

"That said Maria L. Zinn owed no debts at the date of her death, and was then the wife of defendant.

"That no administration of her estate was ever had, nor the appointment of an administrator asked for or made.

"That she had no children by her marriage with defendant, and she has no other heir than plaintiff.

"Plaintiff further says, that since the death of her mother

plaintiff has often demanded of said defendant that he pay to her said money, and said defendant has told plaintiff at divers times that said money realized from said real estate belonged to her, and that he would pay it to her, yet said defendant neglects and refuses so to do.

"Plaintiff says that by reason of the premises, said defendant is indebted to plaintiff in the sum of one thousand and seventy-five dollars, with interest thereon from the 14th day of November, 1883.

"Wherefore the plaintiff prays judgment against defendant for the sum of one thousand and seventy-five dollars, and interest thereon from February 1st, 1882, and for costs of suit."

Section 11 of the code of civil procedure provides as the period within which an action can only be brought: "Within four years an action upon a contract, not in writing, expressed, or implied," etc. And section 16 provides that, "An action for relief not hereinbefore provided for can only be brought within four years after the cause of action shall have accrued."

These provisions of the statute seem to include money received by an agent for his principal, and an action for the recovery of such money must be brought within four years from the time it was received, or it will be barred.

The petition alleges that the money was received by the defendant on the first day of February, 1882; there is no allegation of a continuing trust, or that the money was to be paid at a date later than the time it was received, and in the prayer of the petition the cause of action is treated as having accrued at the date named, and interest is prayed for from that time.

The statute is regarded as one of repose. It proceeds upon the expediency of refusing to enforce a stale claim, whether it has been paid or not, and its object is, as was said by Judge Story, "To suppress fraudulent and stale claims from springing up at great distances of time and sur-

prising the parties or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time or the defective memory or death or removal of witnesses." *Spring v. Gray*, 5 Mason, 528. *Hurley v. Cox*, 9 Neb., 230.

In the case at bar, no facts are alleged showing that the running of the statute has been suspended. The oral promise of the defendant to pay the debt set out in the petition is of no validity. Such promise, under the statute, must be in writing. Code Civil Pro., sec. 22.

The judgment of the district court is clearly right and must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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B. F. ROBERTS, PLAINTIFF IN ERROR, V. E. HERSHISER,
DEFENDANT IN ERROR.

Bill of Exceptions. Where it is sought to review the judgment of the trial court upon the facts, the evidence must be preserved in a bill of exceptions.

ERROR to the district court for Holt county. Tried below before TIFFANY, J.

Uttley & Small, for plaintiff in error.

M. P. Kinkaid, for defendant in error.

MAXWELL, CH. J.

This action was brought in the district court of Holt county, to compel the plaintiff in error, who was then county judge, to issue an execution upon a judgment pre-

State v. Dodge County.

viously rendered in the county court of said county. The district court rendered judgment granting the writ from which the plaintiff brings the cause into this court by petition in error. There is no bill of exceptions in this case. It is therefore impossible for this court to review the action of the trial court. It is evident that testimony was introduced on the hearing, but whether or not the evidence warranted the judgment actually rendered we have no means of determining.

The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

STATE, EX REL. HARLOW GOFF, V. COUNTY BOARD OF
DODGE COUNTY ET AL.

1. **Taxes: EQUALIZATION OF ASSESSMENT.** To justify the board of equalization in increasing the assessment of an individual, a complaint must be made. Such complaint, if oral, must be reduced to writing and spread upon the records as the foundation of its action, and a mere recital that oral complaint was made to such board, without setting out the complaint, is not sufficient.
2. ———: ———: **POWERS OF BOARD.** Upon a complaint being filed, the board of equalization, in reviewing the assessment of an individual, has appellate, special, and judicial powers, and until evidence is received by it in support of the complaint the tax-payer may rely upon the valuation made by the assessor.
3. ———: ———: **MANDAMUS.** Where a board had made up its record to show inferentially that evidence had been heard in support of their action in increasing the valuation of an individual assessment, where in fact no such evidence had been received, *Held*, That the board will be required to correct its record so as to conform to the fact.

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| 30 | 595 |
| 57 | 679 |

ORIGINAL application for mandamus.

W. H. Munger, for relator.

J. E. Frick, for respondents.

MAXWELL, CH. J.

This is an application for a peremptory writ of mandamus to compel the defendant to correct the records of the board of county commissioners of Dodge county, sitting as a board of equalization, so as to conform to the facts.

The cause is submitted to the court upon the following agreed statement of facts:

"1st. The relator, on the 1st day of April, 1886, was the owner of the following real estate, to-wit: Part of the south-east quarter of section 10, township 17, range 8, in Dodge county, Nebraska, containing eight acres; which real estate was duly assessed in the name of the relator and placed on the assessment roll in his name for the year 1886.

"2d. Said county commissioners, defendants, were duly organized as a board of equalization, and were on the — day of June, 1886, in session as such board as provided by law.

"3d. That at such time oral complaint was made to such board that the property of various persons, and among others the real estate of the relator, was assessed too low; whereupon the board caused a notice to be issued notifying each of said persons of said complaint; that said notice was duly served on the relator, requiring him to appear before said board on the day named in said notice at the office of the county clerk of said Dodge county, and show cause, if any he have, why his assessment on the real estate in question should not be raised as prayed for.

"4th. That on the — day of June, 1886, while said board was still in session as a board of equalization, and after the day fixed in the notice served on the relator, the board made the following order, to-wit:

" 'The board having inquired into and examined the various cases complained of, and heard the parties in their own behalf, and upon proper consideration of the same, made the following order, to-wit: That part of the south-east quarter of section 10, township 17, range 8, Harlow Goff owner, assessed at \$50, be raised to \$240.'

"5th. That all the real estate in the vicinity of relator's was raised in the same proportion as relator's, and all orders with reference to the same were made the same in manner and form as that relative to relator's real estate.

"6th. That in raising the assessment of relator's real estate as aforesaid, said board did not swear any witnesses nor hear any sworn testimony of any kind or nature; nor documentary or record evidence, except as hereinafter stated.

"7th. That two of the members of said board, prior to said time, were appointed by the county judge of said Dodge county, and were acting as members of a commission to appraise the value of real estate in condemnation proceedings for railroad purposes, as provided by law; and that real estate in the immediate vicinity of relator's real estate in question had been viewed by the members aforesaid for the purpose of appraisal, and had been appraised by them, and they were well acquainted with the real estate in question and knew the value thereof at the time they raised said assessment as aforesaid.

"8th. That there was also on file in the office of the county clerk of said Dodge county, a deed from relator to the F. E. and M. V. R. R. Co., conveying a portion of the real estate in question to said R. R. Co. for right of way purposes, which deed had been placed on file and the conveyance made immediately preceding the raising of said assessment, and from which deed the apparent value of re-

lator's real estate was made to appear, it being personally believed by the board at that time that there was no appreciable damage to relator's real estate by the taking of said right of way, except the market value of the land actually taken for such right of way.

"9th. That the relator offered no evidence at the time and place fixed in said notice, nor did he request the board to swear or examine any witnesses; nor did he request or demand at that time any record to be made or kept by said board, and the board did not keep any record of any evidence or hear any witnesses or have any evidence except as hereinbefore stated in paragraphs 7 and 8.

"10th. That relator has made a demand upon the defendants to amend their said record so as to show the fact as to whether they heard any evidence in the matter of raising said assessment, which they have refused to do."

The said parties from the foregoing facts submit for the judgment of the court the following; 1st. Had the said board of county commissioners authority to raise said assessment without legal evidence before them as to the value of said property?

2d. Was the action of said board of county commissioners, in raising the assessment of relator's said property, in manner as above stated, valid?

The statute provides for the election of an assessor in each precinct or township, and requires him to give bond in the sum of \$500, conditioned for the faithful discharge of all duties required by law, which bond is for the use of any persons injured by a breach of its conditions. Sec. 12, Chap. 10, Comp. Stat. Among the duties required of such assessor are the following: "Assessors shall, between the first day of April and the first day of June of each year, *actually view and determine*, as nearly as practicable, the value of each tract or lot of land listed for taxation as provided by this act, and set down in proper columns, in the book furnished him, the value of each tract or lot im-

proved, the value of each tract or lot not improved, and the total value. * * *” Comp. Stat., Chap. 77, Sec. 52.

Sec. 54 requires the assessor to assess the value of all the personal property, in his territory, and to obtain a sworn statement of such property from each person listing the same.

Sec. 56 authorizes the assessor to compel the attendance of witnesses, and to examine on oath any person whom he may suppose to have knowledge of the amount or value of the personal property of any person refusing to list his property.

By sec. 60 the assessor is required, when requested, to deliver to any person assessed a copy of the statement of his property, showing the valuations of the assessor of the property so listed.

It will thus be seen that the assessor is to fix the actual assessable value of the taxable property named in his territory. In fixing such values, he acts judicially. Cooley on Taxation, p. 550, *et seq.*, and cases cited. His assessment, therefore, becomes final—as much so as a judgment of a court upon a subject where it has jurisdiction, unless reviewed in the mode provided by law. The assessor is required to ascertain the value of each tract of land assessed by him, not by hearsay, not by calling witnesses, but by actually viewing the land itself. The evident object of the statute is to enable the assessor to fix the true value of the land, and in the absence of any proof upon the subject the presumption is that he has done his duty.

Section 70 provides that the county commissioners shall act as a board of equalization, and, commencing on the first Tuesday in June, annually, after the return of the assessment books, hold a session of not less than three nor more than twenty days for that purpose. And that “on the application of any person considering himself aggrieved, or who shall complain that the property of another is assessed too low, they shall review the assessment and correct the

same as shall appear to be just. No complaint that another is assessed too low shall be acted upon until the person so assessed, or his agent, shall be notified of such complaint, if a resident of the county; *Provided*, That in counties under township organization, that such application shall have been made to the town board of equalization, and been rejected by them."

It will be seen that relief may be granted in two classes of cases: First, where the complainant supposes himself to be aggrieved by his own assessment; or, second, by the low assessment of another. While the word aggrieved does not occur in the second provision above quoted, it is clearly implied.

Where one has no property subject to taxation, his burdens cannot be increased by too low a valuation of the property of others. In other words, the complainant must be aggrieved by the low assessment. This principle runs through the entire body of the law, and no court would sustain a mere volunteer, having no interest in the subject in controversy, in prosecuting an action.

In the case at bar it is agreed that "oral complaint was made" to the defendants that the property of the relator was assessed too low; by whom made we are not informed; it may have been by a resident of some other state casually passing through said county and having no interest in the matter in controversy, or by a child of tender years; the name even is not given.

Webster defines the word *complaint* to mean, in law, "A form of legal process which consists of a formal allegation or charge against a party, made or presented to the appropriate court or officer, as for a wrong done or a crime committed; in the latter case generally under oath." Now supposing the alleged oral complaint to have been made by a proper party, the substance of it must be reduced to writing as a basis for the action of defendants. In the record presented to us there is no complaint, either formal

or informal, and the record of the defendants fails to show the existence of such an instrument. We have their naked assertion that such oral complaint was made. This, however, falls far short of showing the existence of a complaint. Even if the complaint were in writing the complainant might become convinced that he was mistaken before it was acted upon, and withdraw such complaint, in which case there would be left no basis for a board of equalization to act on.

The question here presented was before the supreme court of California, *People v. Reynolds*, wherein the court say (28 Cal., p. 111), "the twenty-third section of the revenue act (Stat. 1861, p. 427) confers on the board of equalization the power to determine all complaints made in regard to the alleged value of any property, and the power to change and correct any valuation, either by adding thereto or deducting therefrom, if they deem the sum fixed in the assessment roll too small or too great. * * * In matters relating to the assessment of property the board of equalization may hear and determine complaints respecting the same, and may correct errors in the assessment roll submitted to them by diminishing or increasing the valuation fixed by the assessor upon the property therein described, but they cannot increase the assessed value without complaint, nor then until the party interested has had reasonable notice of the day when they will act in the case.

"When the party interested appears in answer to the notice or summons, he is entitled to be informed of the matters which he may be required to meet, and until a case be established authorizing an addition to be made to the assessed valuation of the property, he will have nothing to rebut, but may rest securely upon the assessed valuation. The board have no more right to add to the assessed valuation of property without evidence authorizing them to do so than a court or jury have to find facts and determine the rights of litigants without evidence. If boards of

equalization may arbitrarily, and of their own mere caprice, increase the assessed valuation of property, then they possess a power without prescribed limits, which may be used for the purposes of the grossest oppression and injustice."

This doctrine was affirmed by the court in *People v. Flint*, 39 Cal., 670, and *People v. Goldtree*, 44 Cal., 323, where it is said, "in order to give the board of equalization jurisdiction to increase the valuation of property beyond the amount at which it has been assessed, the filing of a complaint is necessary." And also, "where the board of equalization makes an order increasing an assessment, without a complaint having been filed, and the party assessed appears and moves to set aside the order, such appearance does not confer jurisdiction by relation, and a refusal to set aside the order does not make it valid."

No cases have been cited to the contrary, and the writer, after a diligent examination, has been unable to find any. The proceedings of a board of equalization necessarily must be made a matter of record. Such proceedings form the basis for the levy and collection of taxes and for divesting the title of the land owner in case of a sale of the real estate for the payment of such taxes. That a tribunal possessing the power to increase such taxes must have jurisdiction will be conceded without the citation of authorities.

Chapter 23 of Comp. Stat., relating to Decedents, authorizes a judge of the district court in certain cases to license a sale of the real estate of minors.

Section 47 provides that, "in order to obtain a license for such sale, the guardian shall present to the district court of the county in which he was appointed guardian, a petition therefor, setting forth " certain facts. There is no express provision that this petition shall be in writing, and even the requirement that it shall be verified might be fulfilled if defendant's position is correct, by permitting the

petitioner to swear to his oral statement of facts. Yet the petition forms the basis on which the jurisdiction of the court depends, and necessarily must be in writing and made part of the records of the case. Many other cases of similar import might be cited, but it is unnecessary.

The board of equalization is simply what its name imports, a board for the equalization of values in certain cases. It possesses no powers save those conferred by statute, and its jurisdiction must appear on the face of the record of its proceedings. As such jurisdiction fails to appear in this case, its action was unauthorized.

2d. The statute confers upon the board of equalization general powers to "ascertain whether the valuation in one township, precinct, or district bear just relation to all the townships, precincts, or districts in the county, and may increase or diminish the aggregate valuation in any township, precinct, or district by adding or deducting such sum upon the hundred as may be necessary to produce a just relation between all the valuations of property in the county, but shall in no instance reduce the aggregate valuation of all the townships, precincts, or district below the aggregate valuation thereof as made by the assessors, neither shall it increase the aggregate valuation of all the townships, precincts, or districts, except in such an amount as may be actually necessary and incidental to a proper and just equalization."

It is simply to *equalize*, and any increase, except such as may be actually necessary and incidental, would be erroneous. *Suydam v. Merrick County*, 19 Neb., 155. Thus, in the case cited, the board added to the assessed valuation of Merrick county the sum of \$114,882.43, and this action was held to be in excess of the powers of the board, and void. In reviewing the assessment of individuals the powers of the board are not original but appellate and special, and depend upon condition that complaint first be made; the board then acts upon the complaint, and hears

evidence to determine whether it be well founded. For the purpose named it is a judicial tribunal, and as far as possible must be governed by the rules relating to evidence.

In no tribunal, so far as the writer is aware, can a case be decided upon the private information of the court, judge, juror, referee, or other officer.

In every case such testimony must be given under oath, in open court, subject to cross-examination and the other incidents to which the testimony of witnesses may be subjected. If this were not so, neither the person, liberty, or property of any citizen would be secure, as it would be impossible to review such action.

Section 13 of the Bill of Rights provides that "all courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."

Section 24, Id., declares that "the right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied."

In *People v. Reynolds*, 28 Cal., p. 111, it was held that the tax payer might "rest securely upon the assessed valuation until a case be established authorizing an addition to be made" thereto. This rule is clearly applicable in this state. There is no claim that the defendants knew the value of real estate generally in the precinct where the land in question is situated. The inference to be gathered from the agreed statement of facts is that they did not possess such general knowledge. So far as appears, all their information in the premises seems to have been derived from two sources; first, from two of the defendants having been members of a commission to condemn real estate for right of way for a railroad, and second, from a certain deed of the relator for right of way.

There is no claim that they knew the relative value of real estate in the precinct, or the value of this property as

compared with the value of other property in the precinct, yet without such information they nearly quintuple the assessed valuation of the relator's real estate, and have made up their record to show inferentially that they received evidence to justify such increase, when, as agreed in the statement of facts submitted, they received none, thereby precluding the relator from having the action of the board reviewed on error. This they had no authority to do, and upon demand being made they should have corrected their record to conform to the facts.

A peremptory writ will therefore issue as prayed.

WRIT ALLOWED.

THE other judges concur.

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KINGMAN & BALLARD, PLAINTIFFS IN ERROR, V. E. B. APPLEGET, DEFENDANT IN ERROR.

1. Evidence examined and *Held* to sustain the verdict of the jury.
2. Instructions referred to, examined and *Held* to have been properly refused.
3. Judicial Sale: SHERIFF'S DEED: DELIVERY. The strictly formal delivery of a sheriff's deed is not essential to its validity, as in a transaction between individuals as private parties to the conveyance of real estate; yet where a deed was written and signed by a sheriff and six years thereafter the purchaser at the sheriff's sale made an affidavit that no deed had ever been executed and delivered by the sheriff to him, and upon such affidavit procures an order of court requiring the execution of a deed by a successor of the sheriff who made the sale, and the judgment debtor testifies that after the sale he paid the amount of the decree to the plaintiff in the case—who was the purchaser at the sheriff's sale—and that the money was received by the plaintiff and purchaser as a full payment and satisfaction of the decree, it was *Held*, That the finding of the alleged deed among plaintiff's papers by their custodian eleven years after the alleged execution thereof, would not raise a conclusive pre-

Kingman & Ballard v. Appleget.

sumption that the deed had been delivered by the sheriff to the purchaser, where the action was between such purchaser and the subsequent grantors of the judgment debtors for the possession of the real estate.

ERROR to the district court for Lancaster county. Tried below before MITCHELL, J.

Ricketts & Wilson, for plaintiffs in error.

W. H. Snelling and *Harwood, Ames & Kelly*, for defendant in error.

REESE, J.

This is an action in ejectment, and is before this court the second time ; the former decision being reported at page 338, 17 Neb. Rep. On the former trial in the district court and the proceedings in error in this court, the present plaintiffs in error relied upon a deed executed by the sheriff in a foreclosure proceeding, some eight years after the sale by his predecessor, and which deed was made in pursuance of an order of the district court, without notice to the judgment defendant. On the latter trial and the present hearing they rely upon a deed executed by the sheriff who made the sale, and which we presume was made soon after the sale, but the abstract fails to give any information as to its date. The documentary evidence introduced on the trial is not set out in the abstract, either in form or substance, and our information as to the contents of the paper referred to is quite meager.

After the cause was reversed by this court, and before the last trial was had, defendant amended his answer, denying the delivery of the first deed by the sheriff, and pleading the statute of limitations.

It seems to be conceded that a decree of foreclosure was rendered in favor of Cox, Ballard & Kingman against McKesson, and that the property in question was sold by

the sheriff under an order of sale, and that the sale was confirmed and a deed ordered. It is also pretty clear that a deed was found among the papers of Ballard by the person in whose care they were left by him, after he had left the state. Mr. McClay testified that he was sheriff in 1874, that the deed appeared to have been executed by him, but that he had no distinct recollection about it. Mr. Owen, the custodian of Ballard's papers, testified that he found the deed among Ballard's old deeds in May, 1885, and that he thought it had been in his possession since March, 1877, —was satisfied of the fact. He also says that Ballard left his papers and accounts—including the decree against McKesson—with him, and that he demanded payment of the decree in 1877, and that McKesson promised to pay. Whether this demand and promise had reference to the whole decree, or to a deficiency after the sale of the property in dispute, we do not know.

McKesson testified that he had paid the decree in full, and that the date of payments extended from 1873 to April, 1875. That he paid the money direct to Ballard & Kingman, and depended upon them to apply it on the decree; that the decree proper was paid in the latter part of 1874, and the costs were collected by garnishee process in 1875, and that he left Nebraska in June, 1876.

The sheriff's deed was not placed upon record until 1885, if then, and in the meantime the property was conveyed by mesne conveyances from McKesson to defendant in error.

The principal questions of fact submitted to the jury appear to have been: was the decree of Cox, Kingman & Ballard against McKesson paid by him as he testified, and was the sheriff's deed ever delivered to Ballard by the sheriff? On both these propositions the jury evidently found in favor of defendant in error; and under the testimony as presented by the abstract, we cannot interfere with these findings.

It is insisted by plaintiff in error that a formal delivery

of a sheriff's deed is not necessary to pass title, as it is where the transaction is between individuals. This is no doubt true, but yet there must be the assent of the sheriff to the possession of the deed by the purchaser. Suppose a deed is written and signed by the sheriff and laid aside with a view of surrendering it upon a compliance with some unperformed condition precedent, it could not be held that the purchaser was entitled to the deed until the performance of the condition on his part, such as the payment of costs or principal. The purchaser must comply with the requirements of the law and orders of the court, if any, before he is entitled to the deed. If he procures it wrongfully, without such compliance, and without the assent of the sheriff, it certainly would not convey title. Or, suppose after the preparation of the deed the sheriff should ascertain, to his own satisfaction, that the decree had been canceled by the payment and receipt of the full amount of principal, interest, and costs due thereon, it would be at least the proper thing for him to withhold the deed until the matter could be presented to the court and its order obtained. Yet no one could contend that the fact of the purchaser procuring the deed wrongfully and without the knowledge or consent of the sheriff would vest the title in him. Therefore the mere fact of the possession of the deed cannot be *conclusive* of its delivery and of title. The question of the delivery of the deed was one for the jury. Their finding, as we have said, must stand. There are many circumstances which tend to strengthen the claims of defendant in error, and which were proper for the jury to consider. Among these was the affidavit of Kingman, one of the plaintiffs in error, made in 1882, in the effort to procure the second deed, that no deed had been "made, executed, or delivered" by the sheriff up to that date. He may have been mistaken, but the whole case shows clearly that if either Ballard or Kingman had received the deed they either did not know it or had forgotten the fact.

If the decree was satisfied, it is not very material as to the deed, for there are no rights of innocent purchasers under the sheriff's deed intervening. The suit is instituted by those who claim as the grantees therein. If they had such deed they withheld it from record from the date of its execution until 1885, eleven years, during which time the judgment or decree would probably become dormant, and in which time the rights of defendant have become vested by purchase. Therefore the finding that the decree was satisfied must end plaintiff's case.

It is insisted that the district court erred in refusing to give certain instructions asked by plaintiff.

The first instruction was as follows: "The jury are instructed that if you believe from the evidence that Kingman & Ballard actually had a sheriff's deed to the property in controversy, then it is wholly immaterial so far as their case is concerned, what affidavit they made and filed in the matter of obtaining a second deed, and you will, in that event, wholly disregard such affidavit."

This instruction was properly refused, for two reasons. 1st, Because it wholly disregards the manner in which the deed was obtained; and 2d, The court had instructed the jury on its own motion that if they found that the deed was delivered to plaintiffs before the decree was satisfied, if it had been satisfied, they should find for plaintiffs. This was enough. They could not have both the satisfaction money and the property.

Objection is also made to the action of the court in refusing to give the fourth and fifth instructions asked by plaintiffs; but as they are sufficiently stated in the fourth instruction given by the court on its own motion, they need not be further noticed.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

20 610
22 448

THE STATE OF NEBRASKA, EX REL. WILLIAM LEESE,
ATTORNEY GENERAL, V. G. W. WILKINSON, TREA-
SURER OF DAKOTA COUNTY.

County Bonds: REFUNDING BONDS: MANDAMUS: ESTOPPEL.

On the 1st day of January, 1876, the county of D., in pursuance of a vote of the people so directing, issued and delivered to the Covington, Columbus, and Black Hills Railroad Company its negotiable ten per cent coupon bonds for the sum of \$95,000, that being more than ten per cent of the assessed valuation of the county. These bonds were duly registered and certified by the county clerk of D. county, and by the secretary and auditor of state. Afterwards the county refused to pay the interest, and an action was instituted against it in the circuit court of the United States for the purpose of collecting the interest due on the coupons. The defense of the illegality of the bonds, owing to the excessive issue, was interposed, but the bonds were held valid in the hands of a *bona fide* purchaser for value, and judgment was rendered against the county for \$14,692.91. No proceedings in error or by appeal were then taken for the purpose of obtaining a review of that judgment. The county board then agreed with the holders of the bonds to execute to them twenty-year six per cent refunding bonds to be substituted for the bonds of 1876, under the provisions of the act of February 28, 1883. The refunding bonds were executed and registered and certified by the county clerk, but the secretary and auditor of state refused to register them or to certify that they were lawfully issued, alleging that such was not the fact. The county then applied to the supreme court for a peremptory writ of mandamus to compel action by the state officers, and judgment was obtained in favor of the county, awarding the writ and compelling the certification and registry. After they were certified and registered by the state auditor, the county exchanged them for the original bonds of 1876, and the interest accrued thereon, and destroyed the original bonds. In an action to enforce the payment of the interest accrued on the refunding bonds, it was *Held*, That the county was estopped to deny their validity in the hands of a *bona fide* holder for value.

ORIGINAL application for mandamus.

William Leese, Attorney General, and J. M. Woolworth,
for relator.

A. J. Poppleton and John M. Thurston, for respondent.

REESE, J.

This is an original application for a writ of mandamus to the respondent, the county treasurer of Dakota county, requiring him to pay the interest on certain coupon bonds of Dakota county, held by the permanent school fund of the state, out of funds in his hands collected by taxation for that purpose. The county board of Dakota county having directed him to withhold payment, he has refused to make the application of the money to the purpose for which it was collected. In reality the county is the interested party, and denies the legality of the bonds.

The history of this alleged indebtedness of Dakota county, as shown by the records of the county before us, and of this court, dates from the first day of January, 1876, when the county issued its bonds bearing interest at ten per cent per annum, to the amount of \$95,000, to the Covington, Columbus, and Black Hills Railroad Company to assist in the construction of its railroad. At that time the total valuation of the county was \$637,656, the issue of bonds being in excess of the ten per cent then allowed by law, although issued in pursuance of a vote of the people at an election held for the purpose, and at which more than two-thirds of the voters voting were in favor of the issue. The bonds were duly registered and certified by the county clerk of Dakota county, and by the auditor and secretary of state, in accordance with the provisions of law then in force. (See chap. 9, Comp. Stats.)

In the case of *Reineman v. C., C. & B. H. R. R. Co.*, 7 Neb., 310, it was held that such an election conferred no power on the county board to issue the bonds, and they

were restrained from doing so. The question of the validity of the bonds in the hands of an innocent holder for value was not before the court in that case, and was not decided; and in our view of this case we do not think it a material question here, notwithstanding the state is an innocent holder for value.

Some time after the issuance of the bonds referred to, the county, through its officers, concluded they were void, and refused payment of the interest. One Henry H. Glidden, being the owner of a large part of the bonds, and upon which the interest was unpaid, brought suit in the circuit court of the United States for the district of Nebraska, for the unpaid interest on his bonds, and at the May term of said court, 1882, recovered a judgment for \$14,692.91. On the trial of that cause it was insisted that the bonds were void, but the court held otherwise and rendered the judgment. In June, 1882, the question of a compromise of the bonded indebtedness of the county and a refunding thereof at a lower rate of interest was suggested, and on the 29th of that month the county board took action thereon, as shown by the following entries upon their records, they being in regular session at the time:

"The matter of the compromise and adjustment of the bonded indebtedness of Dakota county on bonds issued January 1st, 1876, to the Covington, Columbus and Black Hills Railroad Company by said county, by the issuance of six per cent bonds in exchange for and substitution of said indebtedness, was considered and discussed by the board, and on motion the board adjourned to July 5, 1882, to further consider the same."

On the 5th day of July the board met pursuant to adjournment, and again considered the matter, as shown by their records, and from which we quote, as follows:

"And now at this time, to-wit, July 5th, 1882, the matter of compromising and refunding the bonds issued by Dakota county to aid in the construction of the Covington, Colum-

bus, and Black Hills Railroad Company came on for consideration. And after due deliberation, and being advised in the premises, it is hereby ordered by the board that the proposition heretofore made by the holders of said bonds to surrender said bonds and coupons, and have the same canceled and to take in lieu thereof new coupon bonds to run twenty years from the first day of July, 1882, payable at the option of the county ten years after this date, and to draw interest at the rate of six per cent per annum, interest payable semi-annually, be and the same is hereby accepted. And the said bond-holders are requested to designate some suitable person as their agent, with authority to surrender said bonds, and to receive and receipt for such new bonds, and to do such other acts as may be necessary in making such compromise. The bond-holders to have the blanks prepared for such new bonds at their own expense."

The board adjourned from time to time until the 14th day of August of the same year, when the following proceedings were had as shown by the record. We quote:

"Now at this time, August, 14th, 1882, the board of county commissioners met pursuant to adjournment * * * * to proceed to the matter of issuing bonds of said county to take up and refund the ten per cent bonds and coupons heretofore issued by said county to aid the Covington, Columbus, and Black Hills Railroad Company on January 1st, 1876. And the said former issue of bonds still being a just debt and legal liability against the county of Dakota, and it being for the best interest of the county to take up the same and issue new six per cent bonds therefor; the said county commissioners do hereby order and authorize the execution and issuance of bonds bearing interest at six per cent per annum from July 1st, 1882, payable semi-annually on the first days of January and July in each year, and running twenty years from and after July 1st, 1882, and principal payable at the option of the county

after ten years from date—principal and interest payable at Farmers Loan and Trust Company in the city of New York, and such issue shall be to the amount of one hundred and forty-four thousand dollars, being the amount of said former issue of bonds with unpaid coupons and interest thereon to July 1st, 1882. And the chairman of the board of county commissioners of said county is hereby authorized and directed to sign and execute said bonds for and on behalf of the county, and the clerk of the county shall duly attest the same and affix the seal of the county thereto, and the coupons thereto attached shall be signed by the clerk of said county, and after the certification and registration thereof, as by law required, the same shall be surrendered respectively to the parties entitled thereto on the presentation of the former issue of bonds and coupons for which said respective new bonds shall be issued in substitution of or exchange for—said substitution and exchange to be dollar for dollar.”

The new bonds were prepared and signed by the chairman of the board, attested, certified, and registered by the county clerk, and presented to the auditor and secretary of state for registration and certification. The auditor and secretary refused to certify and register the bonds as requested, giving as their reasons therefor a doubt as to their legality, owing to the excessive issue of the bonds of 1876. The county of Dakota then instituted a mandamus proceeding in the supreme court against the state officers named, to compel them to register and certify the bonds as having been “regularly and legally issued” and properly registered. Upon a hearing of the cause a peremptory writ of mandamus was issued as prayed, and the auditor and secretary of state were compelled to register and certify the bonds. See *The State of Nebraska, ex rel. Dakota county, v. S. J. Alexander et al.*, 14 Neb., 280.

In that case the county was represented by able counsel who urged upon the court the propositions that the bonds

of 1876 were a legal liability against the county, and that the compromise affected was one greatly to the county's interest.

On the former proposition they said—quoting from their brief—

“It has been held by this court, *Reineman v. C., C. & B. H. R. R. Co.*, 7 Neb., 310, that the issue of bonds in excess of the ten per cent of the valuation is illegal, and the United States circuit court for this district has held that such issue is illegal and that such ‘illegality is available to defeat the bonds in the hands of the original donee or holder, with notice of the excess.’ It is conceded that this position is correct. But the question here is not whether it was legal to issue the bonds, but whether they constitute a ‘legal liability’ against the county. The distinction is obvious. The consideration of a negotiable note or bond may be illegal, while in the hands of a *bona fide* holder it may be a legal and valid obligation enforceable by suit. * * * The act of 1877 was passed for a practical purpose, which clearly appears on its face. That purpose was to enable counties without a vote of the electors to exchange for bonds bearing ten per cent interest new bonds bearing a lower rate, and by that much lessen the burden of the county. It seems an obvious proposition, that if it be uniformly held by the courts of competent jurisdiction in which all the suits on the bonds may be, and if necessary will surely be, brought, that they are a ‘legal liability,’ then for all practical purposes, and within the intent of the law, they are so. The qualification that they can be enforced only by *bona fide* holders, furnishes no practical protection to the county. Negotiable in form, transferable by mere delivery, not maturing for many years to come, the purchaser not even put on inquiry by the presence of unpaid matured coupons, and, with the presumption of the law that the holder paid value and took them without notice of excess of issue or other ille-

gality or failure of consideration, no successful defense has yet been made, or in all probability ever will be made against the bonds in question.

"We submit to this court that in the face of the multitude of adverse decisions by that final tribunal, repeated as often as cases reach it, and controlling those of inferior federal courts where no review can be had, it is hopeless for this county to fight against fate. It is the part of wisdom in municipal as well as private affairs to submit to the inevitable and make the best of it. Counsel submitting this paper have persistently and unavailingly urged in the litigation already had whatever argument and reason they were master of against the conclusions reached. They believe their client acts wisely in making 'a virtue of necessity' and the best terms of compromise that can be secured."

Upon the latter proposition they say, "The advantages to the county in making the compromise, assuming that the bonds and coupons of 1876 will be valid, are obvious.

"First, the arrears of interest, in round numbers about \$50,000, will be funded in six per cent thirty-year bonds, instead of being put into judgment as fast as the machinery of federal courts will permit, and collected at once by peremptory and grievous tax levies and assessments.

"Second, the annual interest on the \$95,000 of ten per cent bonds is \$9,500. At six per cent it will be \$4,800. Annual difference, \$4,700. Aggregate difference for fourteen years before the bonds of 1876 will mature, \$65,800. (The figures here given are quoted from the brief as there found, without any reference to their correctness).

"Third, it gives the taxpayers ample time at a low rate of interest to meet the obligations, thus throwing a part of the burden upon the people and the taxpayers of the future, for whose benefit the debt was incurred, if, in fact, the object for which it was created was a public benefit."

Finally, it is submitted by the county that the case "is clearly within the statute which allows the commissioners,

in their discretion, to exchange and substitute the proposed bonds for the former issue, which practically and effectively constitute a 'legal obligation against the county.'"

As we have said, upon these records, arguments, and the application of the county, the peremptory writ of mandamus was awarded, and thereby the state officers were compelled to certify—in the language of the statute—"under their seal of office, * * * upon such bonds, the fact that they have been regularly and legally issued," and the bonds thus certified, negotiable in form, were thrown upon the markets of the world and purchased by those who relied upon the certificates and adjudication.

We have copied at some length from the records and representations of the county in procuring the adjudication referred to, not for the purpose of showing that the original bonds were legal when issued, nor even a "legal liability" against the county, nor have we thus referred to the judgment of the supreme court and the registration and certification of the bonds in question here for the purpose of showing that by either the bonds were made valid—for we do not hold that the registry and certification of an invalid bond makes it valid—but for the better consideration of the contention of the relator that by these several acts and the results which followed, the county is now estopped to deny the validity of the bonds in the hands of an innocent holder for value.

There is, without doubt, a wide distinction between the holdings of the supreme court of the United States and of the supreme courts of many of the states upon the question of the rights of *bona fide* holders of negotiable municipal bonds, as against defenses made by the municipalities in actions to recover on such bonds. But this distinction is not so well marked when the controversy arises before the issue of the bonds, between the taxpayers on the one hand and the officers of the municipality or the donee on the other. In the latter case the doctrine of estoppel has

no place. Neither do the rights of innocent holders for value intervene, and therefore the rule may be said to be universal that in cases where the prevention of the exercise of the power to execute and deliver such bonds is the relief sought, a strict compliance with the provisions of law will be required or the delivery of the bonds will be enjoined. 1 Dillon Municipal Corporations, sec. 164.

It is well settled that a municipal corporation may be estopped by its own acts, if within the powers conferred by law, the same as an individual. *Kneeland v. Gilman*, 24 Wis., 39. *Houfe v. Fulton*, 34 Id., 608. *Leavenworth v. Laing*, 6 Kas., 274. *Argenti v. San Francisco*, 16 Cal., 255. *Hooker v. Bank*, 30 N. Y., 83. *Howe v. Keeler*, 27 Conn., 588. *Hart v. Stone*, 30 Id., 94.

It is provided by statute that any county may issue its bonds for the purpose of refunding its bonded indebtedness—Act 1883, Laws 1883, 194—and that the act shall include all bonds determined to be valid and binding, in the hands of *bona fide* holders, by any state or federal court of competent jurisdiction within the state, etc., and that it shall be the duty of the auditor of state to register the substituted bonds, and the secretary and auditor of state to certify them, etc. By the law governing the certification of bonds, it is made the duty of the auditor to first satisfy himself that the bonds have been legally issued, etc., and to certify the fact. Chap. 9, Comp. Stats. The state officers refused to make the certificate to the refunding bonds for the reason that they believed them invalid. The county insisted that they were valid, procured a judgment of the supreme court that it was the duty of the officers to certify as requested, and in obedience to that judgment the bonds were registered and certified and allowed to go upon the market. Furthermore, it was insisted by the county that the officers should certify the bonds because they were compromise bonds issued in settlement of bonds which had been held and determined, by

a federal court of competent jurisdiction, to "be valid and binding in the hands of *bona fide* holders thereof in an action thereon," and therefore constituted a legal liability against the county.

In *The County of Jasper v. Ballou*, 103 U. S., 745, where bonds were issued under a statute authorizing it to refund bonds previously issued, and which previous bonds were issued by virtue of a vote of the people at an illegal election—being called by the board of supervisors instead of by the county court, as the law provided—and where the funding bonds were taken and held by the holder of the original bonds in exchange therefor, it was held that the county was estopped from setting up the alleged invalidity of the original bonds as a defense to the action on the refunding bonds. See also *Board of Liquidation, etc., v. Railroad Co.*, 109 U. S., 221. *New Albany v. Burke*, 11 Wall., 96. The law requiring it, the funding bonds were issued in pursuance of a vote of the people. In this state such vote is not necessary. The same power is lodged in the county board.

The general power of a county to compromise pending litigation or certain classes of disputed claims is conceded by respondent, but it is contended that no power exists to legalize void corporate actions by way of compromise. Or, in other words, it is insisted that the county of Dakota had no authority to compromise this claim, because it was void from the beginning. The federal court had held the original bonds valid in the hands of a *bona fide* holder for value. The county acquiesced in that judgment, and declined to contest the case further, and compromised the whole indebtedness. Thus, by its own action, it brought itself within the letter of the act of 1883 (sec. 2), which authorized it, in that contingency, to issue the refunding bonds. It is true that after it had effected the compromise it sought a review of the judgment of the federal court by a proceeding in error in the supreme court of the United

States, but upon it being made to appear to that court that the bonds in question here had been issued and delivered and the old bonds destroyed, the writ of error was dismissed; the court holding that it was a valid compromise, settlement, and extinguishment of the cause of action. *Dakota County v. Glidden*, 113 U. S., 222. But this effort to secure a review of the adverse decision of the circuit court was not made until after the county had procured the judgment in the case of *The State, ex rel. Dakota County, v. Alexander* (14 Neb., 280), nor until after the original bonds had been surrendered and destroyed, and the funding bonds issued and accepted in their stead.

The funding bonds may be, and probably are, legal, as the result of a compromise of the demand growing out of the bonds of 1876, but we do not decide that question. We hold that the county is now estopped to deny their legality in the hands of a *bona fide* purchaser for value, and that the relator is entitled to a writ of mandamus to compel the county treasurer to pay the interest out of the funds in his hands collected for that purpose.

WRIT ALLOWED.

THE other judges concur.

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MARY E. GRIFFIN, PLAINTIFF IN ERROR, V. WESTERN
MUTUAL BENEVOLENT ASSOCIATION, DEFENDANT
IN ERROR.

1. **Insurance:** DEATH OF INSURED ENGAGED IN VIOLATING LAW. One G., who had a certificate of insurance on his life in favor of his wife, with an accomplice went into the treasury department of the state in the daytime and demanded money belonging to the state and was given five hundred dollars. He then left the department and had nearly reached the outer door of

the capitol, when a policeman, previously placed in a passage way but in the rear, commanded him to halt, and at the same instant fired and killed G. The certificate of insurance above referred to contained a provision that if the insured should "die while violating any law," etc., all rights under the certificate should be forfeited. *Held*, That as G. had obtained the money, and was endeavoring to escape when he was killed, that he was not at the instant of death violating any law, and there was no forfeiture of the certificate.

2. ———: STIPULATION FOR JUDGMENT. Where the parties in effect stipulate that in case a recovery can be had on a certificate of insurance the amount will be seven hundred dollars, and the court so finds, the finding will not be disturbed.

ERROR to the district court for Lancaster county. Tried below before HAYWARD, J.

R. D. Stearns and Hamilton & Trevitt, for plaintiff in error.

L. W. Colby and Griggs & Rinaker, for defendant in error.

MAXWELL, CH. J.

This cause was submitted to the district court on the following agreed statement of facts:

"It is agreed by the parties herein that the said James W. Griffin had been a short time prior to the day of his death, on the 28th of February, 1885, solicited to enter into a conspiracy to rob and defraud the state treasury of Nebraska, it being represented to the said James W. Griffin that the said state treasurer of Nebraska was knowing to, and concerned in said conspiracy, and that the plan and detail of said conspiracy was to make a raid upon said state treasury and take and carry away certain moneys belonging to the state of Nebraska, which the state treasurer was to conveniently leave where said money could be conveniently taken by said conspirators, with simply a show of force and arms, and the said state treasurer was then to

report a larger sum of money than was taken by said conspirators and have the same allowed to him, and the extra amount so obtained by the state treasurer was to be divided up among the conspirators. Upon these representations the said James W. Griffin was induced to enter upon said conspiracy and did enter upon the same. On the other hand, some days before the 28th of February, 1885, the matter was made known and represented to the state treasurer of Nebraska as a veritable plot to rob the state treasury by force by the said James W. Griffin and others associated with him, and the said treasurer believed said representations to be true, and that it was his duty to take proper precautions against such plot and its successful perpetration. The proper state authorities of the state of Nebraska, having been informed of the time of day and the manner and the number of persons that would be engaged in said plot, and attempt to consummate the same, and when and where such attempt would be made to rob the said treasury by the said James W. Griffin and his associates, employed five persons, who were all fully armed and authorized to resist such attempt, two being placed and concealed in the inner room of the treasurer's office so as to observe what transpired, one in the hallway which gave access to the treasurer's office, one in the basement under the treasurer's office, and one, as a supposed confederate of the said James W. Griffin and his associate, was to enter said treasurer's office and assume to act with the said James W. Griffin in the perpetration of said design and attempt aforesaid, and who was also to dampen the powder in the cartridges of the revolvers of the said conspirators so that the same would not explode, and who did so dampen the powder as aforesaid.

"On said 28th of February, said James W. Griffin, with one real associate and with the man employed as aforesaid, pursuant to the said conspiracy and plans on their part as aforesaid, entered the state treasurer's office, and drew their

revolvers upon and demanded of the state treasurer the moneys belonging to the state in his possession. Pursuant to said demand of said James W. Griffin and his associates, the state treasurer delivered to the said James W. Griffin the sum of five hundred dollars of the money of the state of Nebraska, then and there in his possession, and the said Griffin and his associates took and received the sum and *started to effect their escape, with the said money.* The said Griffin passing out into the hallway, where one of the watchmen so employed by the state authorities was stationed, and entering said hallway in plain view of said watchman and about twenty feet distant from him, and thence passing westward, not seeing said watchman, to the west door of the capitol of the state of Nebraska, when said watchman called said Griffin to 'Halt,' and simultaneously fired upon him with a double barrelled shotgun loaded with 'BB' shot, which took effect in said Griffin's back, and as said Griffin staggered forward said watchman fired with said gun so loaded again, which shot took effect also in said Griffin's back, from the effect of which said shot and wounds caused by said shot so given the said Griffin died within two hours thereafter.

"The said James W. Griffin was a cripple with only one natural leg, the other being an artificial stump or peg, which fact was known to said watchman, and said Griffin was incapable of speedy running. That afterward said watchman was duly indicted for such killing of Griffin, tried, convicted, and sentenced to the state penitentiary of Nebraska. That satisfactory proofs of the death of the said James W. Griffin were made, excepting whether said Griffin died while violating any law of the state of Nebraska, or not.

"That the foregoing facts all transpired at Lincoln, Lancaster county, Nebraska.

"That an assessment on the membership of the defendant made at the time of the death of said James W. Griffin would have realized the sum of seven hundred dollars."

On the trial of the cause the court below found the issues in favor of Mrs. Griffin, and rendered judgment in her favor for the sum of seven hundred dollars.

This is an action upon a certificate of membership issued by the Western Mutual Benevolent Association to James W. Griffin, the plaintiff Mary E. Griffin being the beneficiary named in the certificate.

The certificate contains the following condition :

"The said member forfeits all rights in said association and this certificate of membership for any of the following causes:—

"Sixth. If the member shall die while violating any law of any nation, state, or province."

The answer set up the defense that the member died under circumstances whereby the policy was avoided by virtue of the condition above stated.

Two questions are presented for determination. *First*, Does the agreed statement of facts show that Griffin was killed while violating a law of the state? and *Second*, If not, is Mrs. Griffin entitled to recover a greater sum than seven hundred dollars?

It will be observed that the condition named is, "if a member shall die *while violating any law*," etc. That is, in the actual violation of a law. Now suppose Griffin had robbed the state treasury, and had left it, and was about to emerge from the building when he was killed, can it be said that at the time of his death he was violating any law of the state? We think not. Suppose that instead of robbing the treasury he had made an assault upon the treasurer in his office, or committed a battery upon him and had left the treasury department and nearly reached the outer door of the capitol when he was killed, it will not be contended that at the time of his death he was violating the law. So in this case the act of Griffin in obtaining money from the treasury had been completed and he was then endeavoring to make his escape. Griffin therefore

was not killed while violating the law, and there is no forfeiture of the certificate on that ground.

2d. That the plaintiff is entitled to recover more than seven hundred dollars. In the agreed statement of facts it is practically agreed that Mrs. Griffin is entitled to one assessment amounting to seven hundred dollars. The claim for a larger sum is evidently an afterthought, and need not be further considered. The judgment of the district court is clearly right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

FREDERICK A. HARMAN, PLAINTIFF IN ERROR, V. AARON G. BARHYDT, ET AL., DEFENDANTS IN ERROR.

1. **Replevin by Mortgagee: INTERVENTION OF ASSIGNEE.** One to whom certain notes secured by chattel mortgage were assigned, is entitled to intervene in an action of replevin brought by the mortgagee to recover possession of the goods.
2. **Parties: INTERVENORS: FINAL ORDER.** An order overruling a petition to intervene in an action, is, so far as the proposed intervenor is concerned, a final order, and reviewable on error.
3. **Mortgage: ASSIGNMENT OF PORTION OF NOTES.** Where one C. executed a number of promissory notes to B. and secured the same by a chattel mortgage on certain furniture, B. transferred a portion of the notes, either absolutely or as collateral security to one H., *Held*, That the transfer of the notes was an assignment *pro tanto* of the mortgage.

ERROR to the district court for Cass county. Tried below before HAYWARD, J.

Crites & Ramsey, for plaintiff in error.

Chapman & Polk, and *M. A. Hartigan*, for defendants in error.

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|----|-----|
| 20 | 625 |
| 33 | 273 |
| 20 | 625 |
| 40 | 807 |
| 41 | 601 |
| 20 | 625 |
| 43 | 493 |
| 20 | 625 |
| 45 | 661 |
| 20 | 625 |
| 49 | 385 |
| 55 | 688 |

MAXWELL, CH. J.

In June, 1885, the defendant Coverdale executed and delivered to Barhydt a chattel mortgage upon certain household furniture, to secure the payment of nine promissory notes, which will be referred to hereafter. The mortgage contained the following provision: "And I, the said Thomas Coverdale, do hereby covenant and agree to and with the said A. G. Barhydt, that in case of default made in the payment of the above mentioned promissory notes or any of them, or in case of my attempting to dispose of or remove from said county of Cass and city of Plattsmouth the aforesaid goods and chattels or any part thereof, or in case the mortgagee shall at any time deem himself unsafe, then and in that case it shall be lawful for said mortgagee or his assignors by himself or agent to take immediate possession of said goods and chattels * * * * and sell the same at public auction."

On March 5th, 1886, Barhydt filed an affidavit and petition in replevin in the county court of Cass county, to recover possession of the mortgaged property. The goods were taken under the order of replevin, but as they were appraised by the sheriff and two appraisers at the sum of \$3,275, the cause was certified to the district court, where on the 25th day of April, 1886, Harman filed a petition to intervene and supported the same by an affidavit as follows:

"Frederick A. Harman, being duly sworn, on oath deposes and says, that on or about the 22d day of June, A.D. 1885, the above named defendant executed and delivered to said plaintiff the chattel mortgage exhibited in the petition or affidavit for replevin herein, for the purpose of securing the payment of nine several promissory notes of the defendant to said plaintiff of even date with said mortgage, as follows: One for \$100 due in thirty days, one for \$100 due in sixty days, one for \$100 due in ninety days, one for

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\$100 due in four months, one for \$100 due in five months, one for \$100 due in six months, one for \$1,600 due in one year, one for \$2,200 due in two years, and one for \$2,100 due in three years after date.

"That on or about the 4th day of February, A.D. 1886, the said plaintiff for a valuable consideration sold, endorsed, and delivered to this affiant two of the above named promissory notes, to-wit: One for \$2,200 due in two years and one for \$2,100 due in three years after date, and this affiant is now in good faith the owner and holder thereof; that no part of the same, either of principal or interest, has ever been paid; that as affiant is advised by counsel learned in the law, the said assignment and delivery of said notes to him as aforesaid operated as a transfer and assignment to him of a ratable proportion of the security for the payment of said notes created by said chattel mortgage, and this affiant avers that said plaintiff did then and there and thereby assign, transfer, and set over to this affiant such a proportion of said mortgage as is represented by the proportion the face of said affiant's said notes bears to the face value of all of the above mentioned notes which still remain unpaid. Affiant is informed and verily believes, and therefore alleges, that all of the notes secured by said chattel mortgage have been paid except one for \$1,600, due in one year, and the two so assigned and delivered to this affiant; that said plaintiff is insolvent and has no property liable to seizure. This affiant now here elects under the clause contained in said chattel mortgage to declare his said promissory notes now due and payable, and to make operative the powers of sale therein contained."

Coverdale filed an answer in the replevin action, denying the facts stated in the petition.

Barhydt filed an affidavit, as follows: "Aaron G. Barhydt, being first duly sworn, deposes and says that he is the plaintiff in the above entitled action; that he resides in Plattsmouth, Nebraska, and is the owner of the furniture

and of the hotel in said city known as the Perkins House; that he is the occupant of said hotel under and by authority of a written lease from F. F. Guthman, the at that time owner of said building; that the statement of the said Harman in said affidavits that said notes for \$2,200 and \$2,100 were sold, endorsed, and delivered to him (Harman) for a valuable consideration, is false and untrue; that the two said notes were left with said Harman as collateral for whatever sum he might be found owing to said Harman on the footing up of the firm books of A. G. Barhydt & Co.; that said arrangement was made soon after the fire which consumed and destroyed their stores and goods; that at that time it was not definitely known just what was due said Harman upon the store account of said Barhydt, but the books will show that there is less than \$100 due said Harman from said Barhydt; that in regard to the \$1,600 note, about the 8th day of January, 1886, the firm of A. G. Barhydt & Co. were overdrawn at the Saline county bank of DeWitt about \$300, that several bills would be due in a short time, and in order to meet them the said firm borrowed \$800 of the said bank, giving the firm note therefor, and that for additional security affiant placed the said \$1,600 Coverdale note in the hands of said bank as collateral for said firm loan; that on the afternoon of the day on which the fire—Feb. 2d, 1886—occurred, affiant assigned to said bank over \$1,500 worth of good accounts to pay up the indebtedness of said firm; that on the 3d day of February, 1886, the firm of A. G. Barhydt & Co. was dissolved by mutual consent, said Harman assuming all liabilities of the firm; that about two weeks ago Harman came to Plattsmouth in order to get affiant to sign some insurance papers, which affiant refused to do until said notes held by Harman and the note held by said bank were returned to him; that Harman did not claim said paper, but said he set no store by the Coverdale notes and would turn them over to affiant or his attorneys any time he would sign the insurance

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papers; that the note held by the bank he had nothing to do with; that it was put up as collateral and he would have to pay cash in order to get the note; that exhibit 'A' hereto attached is a true and correct copy of one of the Coverdale notes secured by mortgage mentioned in affidavit of Harman; that said note is in possession of affiant and is wholly unpaid; that exhibit 'B' hereto attached is a true copy of a receipt given by said Harman for the two Coverdale notes heretofore mentioned; that affiant is not insolvent but is possessed of moneys, credits, property, over and above any indebtedness he may have.

"EXHIBIT 'A.'"

"\$100.

PLATTSMOUTH, NEB., June 22, 1885.

"Six months after date we jointly and severally promise to pay to the order of A. G. Barhydt, one hundred and no dollars, for value received, with interest at the rate of ten per cent per annum from date until paid. And if collected by suit we hereby agree to pay reasonable attorney's fees, and consent that the same shall be taxed as costs and entered up as a part of the judgment.

"Negotiable and payable at the First National Bank of Plattsmouth.

"(Signed.)

T. COVERDALE."

"EXHIBIT 'B.'"

"DEWITT, NEB., Feb. 3d, 1886.

"Received of A. G. Barhydt, as collateral to any indebtedness F. A. Harman may have or will have against A. G. Barhydt, the following notes secured by chattel mortgage: one note for twenty-two hundred dollars, dated June 22d, 1885, due two years after date, signed by T. Coverdale; one for twenty-one hundred dollars, dated June 22d, 1885, due three years after date, signed by T. Coverdale; each of the above notes bearing interest at the rate of ten per cent from date.

"(Signed)

F. A. HARMAN."

There was also the affidavit of M. D. Polk, in substance that Barhydt in his presence "demanded of said Harman his two Coverdale notes, together with the \$1,600 note held by the bank at Wilber, as a condition precedent to Barhydt's signing some insurance papers, so that the loss really sustained by A. G. Barhydt & Co. might be promptly paid to Harman." * * * "Harman furthermore stated that he only took the Coverdale notes as collateral," etc.

On the 30th of April, 1886, the court overruled the application of Harman to intervene, to which he excepted, and now brings the cause into this court by petition in error.

The attorneys for Barhydt claim that as there is no final order and that a judgment has not been rendered in the action, this proceeding in error is premature. An order in the progress of an action, to be final, must be such as determines the action and prevents a judgment. *Hobbs v. Beckwith*, 6 O. S., 252. An order affecting a substantial right, made in a special proceeding, is a final order. *Powers v. Reed*, 19 O. S., 189. *Turpin v. Coates*, 12 Neb., 321.

In the case last cited, the discharge of a garnishee before judgment was held to be a final order, and subject to review on error before judgment, citing *Watson v. Sullivan*, 5 O. S., 43. The reason is, the discharge of the garnishee would deprive the plaintiff of the lien acquired by his attachment upon the moneys and credits in the hands of the garnishee, and thereby deprive him of a substantial right. So in the case at bar, Harman had some interest in the goods in question and some right to the possession apparently. The extent of that right is a question for the jury; but sufficient was shown *prima facie* to entitle him to intervene to protect his right in the premises. *Taylor v. Adair*, 22 Iowa, 279. *Summers v. Hulson*, 48 Ind., 228. *Stich v. Dickinson*, 38 Cal., 608. *Carter v. Mills*, 30 Mo., 432.

The provision of the code in relation to intervention is, like all other provisions, to be liberally construed, with a view to promote its object and assist the parties in obtaining justice.

Whether Harman took the notes in question absolutely, or as collateral security, can make no difference so far as his right to protect his interest in the property is concerned. A transfer of notes secured by mortgage is a transfer of the mortgage *pro tanto*. *Studebaker Manfg. Co. v. McCargur*, ante p. 501, and cases cited. Harman therefore had an equitable assignment of so much of the chattel mortgage in question as was necessary to secure the notes held by him, and should have been permitted to protect that interest. The court therefore erred in excluding him. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

FULLER & JOHNSON, PLAINTIFFS IN ERROR, v. J. C.
SCHROEDER, DEFENDANT IN ERROR.

1. **Appeal: TRIAL.** An action appealed from the county court to the district court must be tried on substantially the same issues as were presented to the county court, unless some matter, such as payment, release, etc., has arisen since the former trial.
2. ———: ———: **PLEADING.** Where change of cause of action does not appear on the face of the petition, it may be set up by answer.
3. **Evidence examined and Held** insufficient to sustain the verdict.
4. **Sale: PRIVILEGE OF USE.** Where a reaping machine was sold with leave to test the same by using it for one day, *Held*, That

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| 20 | 631 |
| 30 | 107. |
| 31 | 460 |
| 31 | 790 |
| 20 | 631 |
| 35 | 691 |
| 35 | 698 |
| 20 | 631 |
| 43 | 558 |
| 20 | 631 |
| 49 | 506 |
| 55 | 443 |

the word *day* is to be understood with reference to the usage of farmers in working with such machine.

5. —: WARRANTY. Where a machine was sold conditionally, and notes given for the purchase price, which notes were to be returned in case the machine failed to comply with the warranty, *Held*, That the return of the machine, if properly made, was a sufficient demand of the notes.

ERROR to the district court for Butler county. Tried below before POST, J.

Myers, Evans & Steele, for plaintiff in error.

W. H. Fuller and Billingsley & Woodward, for defendant in error.

MAXWELL, CH. J.

The plaintiffs allege in their petition "that on July 16, 1882, said plaintiff conditionally purchased of defendants a Walter A. Wood harvester and binder under an express warranty made by defendants, a copy of which warranty is hereto attached, marked 'A,' whereby defendants warranted said machine to be made of good material, and capable of doing first-class work in cutting, binding and saving grain—that being the purpose for which said machine was intended—and that the plaintiff was to have one day in which to give said machine a fair trial, and if said machine did not work properly, then, and in that case, said plaintiff was to notify the agent of said defendants of the defects of said machine, and if the agents of the defendants could not, and did not, remedy said defects and cause the said machine to work in a proper manner, then, and in that case, this plaintiff was to return the said machine to said defendants. That said plaintiff, after giving said machine one day's trial, and the said machine wholly failing to do the work which it was warranted to do, to-wit: cut, bind, and save grain in a satisfactory manner, said

Fuller & Johnson v. Schroeder.

plaintiff notified the agent of said defendants that said machine would not work as represented. The said agent failing to remedy the defects, or to so adjust the said machine that the same would work in a satisfactory manner, or in the manner which it was warranted to do, and the said machine being wholly worthless for the purpose for which it was intended, and for which plaintiff purchased it, and of no value whatever to the said plaintiff, the said plaintiff returned said machine to the agent of said defendants, and demanded a return of the money and notes that he had paid for such machine, which said money and notes said defendant's agents refused to so return.

That said plaintiff, in payment for said machine, paid to defendants the sum of \$50.00 in money, and executed and delivered to said defendants his promissory notes to the amount of \$262.50, payable at different times and dates, the exact dates of the several payments being unknown to the plaintiff. That when said plaintiff returned said machine he was entitled under the terms of said conditional sale to a return of the said sum of \$50.00 in money, and also to the return of his promissory notes to the sum of \$262.50, but defendants refused to so return them, but retained the same and converted the said money and the said notes to their own use. That said notes drew interest at ten per cent from date, whereby defendants become indebted to plaintiff in the sum of \$50.00, with seven per cent interest from July 16, 1882, and \$262.50 with ten per cent interest from July 16, 1882."

The following is a copy of Exhibit "A":

"ULYSSES, NEB., June 16, 1882.

"Whereas, J. C. Schroeder has this day given his order for one 6½ foot cut harvester and binder. Said machine is warranted to be well made of good material, and capable of doing first-class work. Purchaser shall have one day to give it a fair trial, and if it does not work, shall give

notice to G. Babson, Jr., and allow him to get to it and remove defect, and if it then does not work well, it shall be returned free of charge to Ulysses.

"G. BABSON, JR., Agent."

Defendants below (plaintiffs in error) filed the following answer :

"1st. Come now the defendants, and for answer deny each and every allegation in said petition contained, except such as are hereinafter admitted.

"Admits the sale of the machine. The execution and delivery of the warranty, and that the contract price therefor was as alleged.

"Defendants allege that said machine was in every respect as in said warranty it was represented and agreed, both in material, workmanship, and capability of doing the work for which it was in said warranty intended and sold.

"2d. For further answer defendants allege that said action was brought into this court by appeal from a judgment rendered by the county court of Butler county, Nebraska, against defendants and in favor of plaintiff, and that the petition of plaintiff was filed herein in the prosecution of said case so appealed to this court by defendants.

"That said action so tried in, and appealed from, said county court, was an action on an account for money had and received, as shown by plaintiff's bill of particulars as therein filed, a copy of which is attached hereto, marked Exhibit 'A.'

"That defendants answered said bill of particulars in said court by general denial, a copy of which answer is attached hereto, marked Exhibit 'B.'

"That upon the issues thus joined in said county court the said cause was there tried on January 3, 1883, and a judgment therein rendered against defendants for \$362.50 and costs.

"That defendants duly appealed from said judgment to

this court by filing their appeal bond within time, and having the same approved and the appeal allowed, and by filing a transcript at the proper time in this court, and having the said cause docketed as required by law. And on May 15, 1883, this court entered an order requiring plaintiff to file his petition in said cause within sixty days from that date. And on July 13, 1883, said plaintiff filed his pretended petition in said cause, to which the court sustained a general demurrer. And on December 19, 1883, plaintiff was granted permission to file an amended petition in said action so appealed as aforesaid. And on January 3, 1884, he filed his amended petition, in which he sets forth, substitutes, and pleads another and entirely different cause of action from the one plead, tried, and brought to this court by appeal in and from said county court as aforesaid, and fully abandons said cause of action so as aforesaid tried in and appealed from said county court, which said cause so appealed to this court is the sole and only action pending in this court between said parties. That said amended petition states only as a cause of action an alleged breach of a written warranty, which will more fully appear from said amended petition, to which reference is made as a part of this answer.

“EXHIBIT ‘A.’

“The plaintiff complains of the defendant for that on July 16, 1882, defendants were justly and truly indebted to plaintiff in the sum of \$312.50, for money had and retained by defendants to and for use of plaintiff.

“Said defendants have not paid the same nor any part thereof, and there is now due from defendants to plaintiff the sum of \$312.50, with interest thereon from July 16 1882.

“EXHIBIT ‘B.’

“Comes now said defendants, and for answer to plaintiff’s petition deny each and every allegation therein named and ask for proof.”

The plaintiff below (defendant in error) demurred to the second count of the answer upon the ground that the facts stated therein were not sufficient to constitute a defense, and the demurrer was sustained.

In this we think the court erred.

An appeal from the county court to the district court necessarily brings up the case for trial in the district court upon substantially the same issues as were presented in the county court, unless some matter has arisen since the trial, such as payment, release, etc. *O'Leary v. Iskey*, 12 Neb., 136. *U. P. Railway v. Ogilvy*, 18 Neb., 638.

The rule is admitted by the attorneys for the defendant in error, but they say that the remedy of the plaintiffs in error was by motion to strike the petition from the files, and that having filed an answer in the case they waived the defect. Where the objection is apparent on the face of the petition, a motion to strike from the files would be the proper remedy; but there are many cases where the objection can be made available only by answer.

The petition in the county court may have been inartistically drawn, and did not fully state the cause of action, as in many cases in that court the pleadings are not prepared by attorneys; but in the district court, where greater care is required in pleading, the cause of action is more accurately set forth.

If the identity of the cause of action is the same, the rule is not violated.

The second count of the answer, however, alleges that said action "was an action on an account for money had and received."

If that allegation is true, the objection in the second count of the answer to the petition was well taken, and the demurrer should have been overruled.

2d. On the trial of the cause the jury returned a verdict in favor of the plaintiff below (defendant in error) for the sum of \$399.12, upon which judgment was rendered.

The material errors assigned will be considered in their order. *First*, That the evidence is not sufficient to sustain the verdict.

The testimony tends to show that the defendant in error purchased the machine in question on the 16th day of June, 1882; that on the morning of the 15th of July, the agent of the plaintiffs in error set up the machine, and on the afternoon of the same day the defendant in error commenced cutting a piece of barley. There is testimony in the record tending to show that the barley was somewhat uneven in height, some of it being of ordinary height and some quite short. The defendant in error concedes that there were two spots in the field where the barley was very short, and the only variance in the testimony upon that point was as to the number and extent of such spots. There is testimony from which the jury might find that at least a fourth of the field consisted of such spots of short grain. That the machine did not work well at first seems to be conceded, although there is no claim that the fault was in the material or construction of the machine.

A. H. Skinner, who was in the employ of the agent of the plaintiffs in error, on his direct examination testifies as follows:

"I set up the machine for plaintiff and partially started it. When we first went into the field it missed a few bundles; it was not properly adjusted. That was July 15th I had the machine almost right when Cooper came, and I turned it over to him. It didn't bind well at first, and would bind two bundles together. That was owing to two reasons. The needle didn't throw quite far enough, and I lengthened that out and then tightened the tension. That is all it needed. After Cooper came I staid while they went round two or three times. Cooper stopped it from binding bundles together. It only bound them together once after Cooper came, to my knowledge. He tightened the tension and stopped that. It might have thrown

off one or two unbound bundles after Cooper came, but I don't remember of any. I think the machine did good work. That was a pretty bad field to run a machine in, on account of the grain being uneven. There was places in it where it was not over six, eight, or ten inches high, and it is difficult to do good work in a field of that kind. I should think one-quarter of the field was short grain. Where the grain is short the head will be taken in with the knotter and make more than it can handle. Any machine would fail to bind in that case. The tension has to be properly adjusted in all machines. Plaintiff was not satisfied with the machine at first, but after Cooper had been there awhile Schroeder expressed himself as being satisfied with the working of the machine. When I was about to leave, Schroeder said he thought it would be a good idea for me to stay and learn from a man who knew how to run a machine, as he had got that to running all right as soon as he came."

J. A. Cooper, who was traveling salesman for plaintiffs in error, on his direct examination testifies:

"I adjusted the machine sold to plaintiff in 1882. I got there about two o'clock; the machine had been started and Skinner seemed to be adjusting the needle when I got there. When I got there it would sometimes bind two bundles together; it lost three or four loose bundles by the grain being too short. The long way of the barley field was east and west. Both of the east corners were very short, and the center of the field was short; in fact it was a very spotted field; barley was better on high ground than low ground. I thought it had been wet in the spring and made it uneven. That machine would bind grain down to twelve inches, and above that length if properly handled; would bind short as well as long grain. There is a crank just back of the operator as he drives, by which he can throw the binder back and forth and get the center of the grain whether it is long or short. If the

grain is short and you fail to throw the binder back the grain comes between the binder and knotter and will fall out unbound. That was sometimes the cause in this case, because the driver seemed to be tending more to his horses, as there was four of them, and he didn't throw the binder back and forth.

"I showed plaintiff how to operate that. He didn't seem to pay much attention to it. He very seldom tried to adjust the machine for short grain. The reason there were two bundles tied together was because the tension was too loose, and for that reason the knife failed to cut the string after binding the first bundle. I explained everything to plaintiff. I asked him to get down from his seat—he was driving the machine—and I would explain to him how to adjust the machine; and he said it was like any binder; and I asked him again to get down, but he didn't, and I gave the explanation where he was sitting. I don't think he learned anything, or very little about it, because he could not see. I tried to show him why it bound two bundles together. I showed him the lever to adjust the reel and sickle for long and short grain. He used these conveniences but very little while I was there. The machine did very good work while I was there. It did the poorest work in the short grain. The band being so near the top, by not adjusting the binder, that they fell out loose, leaving the string on the ground. That would have been bound outside of the extremely short grain had the driver properly adjusted the machine for short grain. The adjustment of the tension and knife very materially affected the binding of the machine. It depends upon the condition of the grain as to dampness and ripeness as to the condition of the tension.

"I examined that machine after it was brought back and found no defects in it. Think I would have found them had there been any. Plaintiff found no fault with it after I adjusted the tension, when I first went there. He said

if it would bind that way it would be all right. When Schroeder brought machine back I went out with him to look at it. The tension was very loose, and for that reason it would not have bound properly without adjusting. Plaintiff then told me he had made other arrangements, and didn't want to keep it if it did good work, and he didn't want to see it work. Think Reynolds and Malone were present at that time. I then asked plaintiff to go with me and put the machine in another field and give me an opportunity to show him that the machine was all right and capable of doing good work. He said he didn't want to see it do good work, and wouldn't take it if it did, as he had already made other arrangements. I think with proper management the machine would have done first-class work. I think an ordinary farmer, by paying proper attention, and doing as requested, could have learned to adjust and run it so as to do good work. I tried to instruct him fairly, but it is hard for a man to talk when he does not get any attention."

G. T. Reynolds, who was in the employ of the agents of the plaintiffs in error, on his direct examination testifies as follows:

"I saw machine work in plaintiff's barley. The grain was very uneven; fair height on west end. On east end of field it was shorter, and in center and north side it was very low; some so short that it never headed out at all. About one-third of it was short, less than twelve inches high. The machine did good work on going over ten inches high. I was at plaintiff's field on July 17, 1882. I went at plaintiff's request, and told him I was not an expert, but could send him Mr. Cooper the next morning. He said that would not do, as his grain was going into the ground. I told him I would go, but reserved the right to send Mr. Cooper there, in case anything was wrong with the machine. The machine did first-class work, and plaintiff expressed himself as satisfied with it. I fixed

the knife, and Mr. Schroeder complimented me for fixing the machine so quick. It was cutting the cord off too quick when I went there, and for that reason did not bind good. That was all the trouble except the tension needed a little adjustment. The knife was an adjustable one. I was there most of the afternoon. No trouble with the machine after we started it. The machine was capable of doing and did first-class work. Hulbert drove the machine while I was there. The machine was hauled back to my office or left in the public square in our town. I never took possession of it. The machine missed binding a few bundles that afternoon, and I showed plaintiff that it was done by pieces of grain dropped into the knotting apparatus, crushing the berry and making the string slick. I told him it would bind the next bundle, and he said, 'I like that;' that his old binder, when it missed one bundle, it would not bind another until it was stopped and fingered with. He said, 'I see this machine does not have to be fingered with every time it misses a bundle.' The machine bound two bundles together once. I tightened up the tension and that remedied that. The string was too loose, and could be fixed by tightening the tension. It did not do it any more. I examined the machine in question and found no defects in it. I would have found them if there had been any. We cut one line through oats. It missed one bundle before we got tensions adjusted for oats. Then it bound the rest. It did good work in the oats, and plaintiff said he guessed it was all right. Plaintiff brought the machine to Ulysses. He did not bring it to my place—he turned across the street and left it standing in the public square. Plaintiff asked me where he should put the machine, and said he had fooled with it all he was going to. I said: 'You ought to have told me yesterday, so I could have remedied it, or given you assistance if you needed any, but you told me you was satisfied, and I don't believe you have a right to return the machine without

giving the company a chance to remedy the defects, if there were any.' I told him I would not receive the machine unless he would allow me to send a man there to see if there was a defect in it, according to our contract. Cooper said the machine was all right, and asked an opportunity to show it, but Schroeder said he couldn't have it; that he didn't want to try it for the reason that it might do good work, and he would then have to keep it, and he didn't want the machine under any circumstances. That was July 18th—same day machine was returned. Think he also said then that he had made other arrangements."

J. C. Schroeder, the plaintiff below (defendant in error), in his direct examination, testified as follows :

"I took the machine out from Ulysses on the 11th of July. Just before starting out, Mr. Reynolds called me into his office and asked me how much money and how many notes I wanted to pay for the machine. The machine was \$312.50, and I gave him \$50 in cash, and one note for \$62.50, and another note for \$100, and two notes for \$100 each. I executed these notes and gave him \$50 in money. I took the machine home that day. Reynolds said he would send a man to set the machine up, and he sent Mr. Skinner on the 15th of July. When the machine started he could not make it work. Mr. Skinner couldn't.

"We started the machine in the afternoon.

"My hired man, Mr. Skinner, and Mr. Cooper was present.

"Skinner said it was his business to feed and taffy until Cooper came. Skinner and Cooper fooled around the machine and fingered with it. Sometimes it would bind two or three bundles together. They would whoop and holler, and Mr. Cooper said it was a good machine because it dragged the sheaves into the shock. Loose bundles would come out, and then they would come out all bound together. All the way they made it work was by one man working alongside of it and helping it all the time. Skinner went

home pretty soon—Cooper stayed most all the afternoon, and towards night he got in his buggy and made us a little speech—that we should loosen the tension in the morning when it was damp, and so on—that after it was run a couple of days and the paint wore off, it would run all right.

“The field was in good condition. The next day was Sunday, and me and my hired man tried the machine. I was anxious and wanted it to do good work. The field was in as good a condition as a man could wish for. I could not make the machine work, and next morning I again went to Mr. Reynolds and told him that if he couldn’t fix it I would haul it in. On the 17th day of July, I went to the agent at Ulysses and told him myself that it would not work and that he must come out and fix it. He came out and tried to fix it, and made it do any kind but good work. The next day was the fourth day that I had it, and I had but three acres left—my hired man and I tried to work the machine; he drove, and I walked along by the side of the machine, and it did just the same way.

“We suffered about four days with the machine cutting nine acres of barley, and we drew off the loose barley, which was five loads, that the machine failed to bind. I followed the directions of Skinner, Reynolds, and Cooper. I did all in my power to do what they instructed me to do, and it done just as poor work as it could do.

“When I had the barley cut, I did not unhitch but drove straight to Ulysses, and returned it to Mr. Reynolds. I wanted my notes and money again, and he said I could not unhitch from the machine, but I unhitched, and never hitched to it again. I demanded my notes, but he would not give them to me. They never returned the notes or money.”

This testimony of Schroeder was given before that of Skinner, Cooper, and Reynolds, heretofore quoted, and there is no rebutting testimony denying certain admissions

alleged to have been made by him: *First*, testimony of Skinner that "after Cooper had been there awhile Schroeder expressed himself as being satisfied with the working of the machine. When I was about to leave, Schroeder said he thought it would be a good idea for me to stay and learn from a man who knew how to run a machine, as he had got that to running all right as soon as he came"; *Second*, the testimony of Cooper, as follows: "I showed plaintiff how to operate that. He didn't seem to pay much attention to it. He very seldom tried to adjust the machine for short grain. * * * I asked him to get down from the seat—he was driving the machine—and I would explain to him how to adjust the machine, and he said it was like any binder; and I asked him again to get down, but he didn't, and I gave the explanation where he was sitting. I don't think he learned anything, or very little about it, because he could not see. I tried to show him why it bound two bundles together. I showed him the lever to adjust the reel and sickle for long and short grain. He used these conveniences but very little while I was there. The machine did very good work while I was there. It did the poorest work in the short grain. The band being so near the top, by not adjusting the binder, that they fell out loose, leaving the string on the ground. That would have been bound outside of the extremely short grain, had the driver properly adjusted the machine for short grain"; and, *Third*, the testimony of Reynolds, as follows: "The machine did first-class work, and plaintiff expressed himself as satisfied with it. I fixed the knife and Mr. Schroeder complimented me for fixing the machine so quick. It was cutting off the cord too quick when I went there, and for that reason did not bind good. That was all the trouble except the tension needed a little adjustment. The knife was an adjustable one. I was there most of the forenoon. No trouble with the machine after we started it. The machine was capable of doing and did first-class work." *

* * And on the succeeding day at Ulysses, "Cooper said the machine was all right, and asked an opportunity to show it, but Schroeder said he couldn't have it, that he didn't want to try it for the reason that it might do good work and he would then have to keep it, and he didn't want the machine under any circumstances."

These are specific charges relating to the conduct of the defendant in error in regard to this machine, and of admissions made by him which are not met by him by his sweeping allegation of performance.

If these allegations were untrue, it was in his power to deny them, and having failed to do so, for the purposes of this action they stand admitted.

While the purchaser of the machine may insist that the machine shall fully correspond in every respect with the terms of sale in regard to material, construction, and otherwise, yet when the machine delivered corresponds in all respects with the terms of sale, and performs according to the conditions of the warranty, the purchase will be complete. The law, while it respects the rights of the purchaser, and protects him in the enforcement of his contract, also protects the manufacturer, who bestowed his material labor, and skill in the construction of the machine, in the assertion of his rights. In other words, the law requires good faith on the part of the manufacturer and also of the purchaser. If, therefore, a machine corresponds in all respects with the terms of sale, the purchaser cannot avoid the sale by reason of his change of mind or neglect to operate the machine with diligence and care. That is, his own conduct, inattention, or want of skill cannot be made the basis of a claim of defect in the machine itself.

If these alleged admissions, made by Schroeder, and the allegations that he did not operate the machine properly, are true, the cause of the defects complained of is largely the result of his own conduct. The facts that on the 17th of July he expressed himself to Reynolds as satisfied with

the machine; that he thereafter completed the cutting of his barley, and immediately on such completion returned the machine to Ulysses, and refused to permit Mr. Cooper to give the machine another trial "for the reason that it might do good work, and he would then have to keep it," are strong circumstances tending to show a determination on the part of Schroeder not to keep the machine even if it complied with the terms of warranty.

The preponderance of the evidence is therefore against the verdict.

3d. The plaintiffs in error claim that the defendant in error having commenced to use the machine about 2 o'clock P.M. of Saturday, July 15th, and used the same during the remainder of that day and also on the afternoon of the succeeding day, is thereby precluded from rescinding the contract.

It is asserted with much confidence that in law there are no fractions of a day, and that the defendant in error having used the machine during Saturday afternoon, thereby used it for an entire day.

"The word *day*, in law, embraces the entire day; but that a day in law is not divisible, is a mere fiction, only observed for the purposes of justice, and never adhered to when it would work mischief." *Follett v. Hall et al.*, 16 Ohio, 113. The purpose of this provision in the contract was to give the purchaser a fair opportunity to test the machine; he was to have it during an entire day. The word *day* is to be understood with reference to the usage of farmers in the working of such machines.

The objection therefore is untenable.

4th. Considerable stress is laid by the plaintiffs in error on the fact that no demand was made for the notes in question before bringing suit. Where, however, the terms of sale are that in case the machine fails to comply with the conditions of the warranty, and may be returned to the seller, or his agent, the return of the machine, if duly

Throckmorton v. State.

made, and notice to the agent, are a sufficient demand of the notes.

The notes are delivered on conditions merely that the machine will fill the requirements of the contract, the delivery not being absolute. It was the duty of the agent, therefore, if the machine was properly returned (but not otherwise) to return the notes. This ground of error is therefore not well taken.

As there must be a new trial, it will not be necessary to consider the other assignments of error.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

J. E. THROCKMORTON ET AL., PLAINTIFFS IN ERROR, V.
THE STATE, EX REL. ERNEST G. HEILMAN, DE-
FENDANT IN ERROR.

1. **Roads: ESTABLISHMENT: MANDAMUS.** An elector residing within five miles of a proposed road, has an interest in the establishing, laying out, opening, and working the same, independent of that which he has in common with the public at large, sufficient to enable him to maintain an action by mandamus to enforce an ascertained duty in respect thereto by a public board or officer.
2. ———: ———: ———. A mandamus will not issue to a county board to cause a section line to be opened and worked as a public road unless it has been judicially ascertained and decided by said board under existing facts and conditions that the public good requires it.

ERROR to the district court for Madison county. Heard below before CRAWFORD, J.

| | |
|----|-----|
| 20 | 647 |
| 26 | 260 |
| 30 | 647 |
| 42 | 3 |
| 20 | 647 |
| 47 | 306 |
| 30 | 647 |
| 49 | 394 |
| 51 | 234 |
| 54 | 446 |
| 55 | 4 |

William V. Allen and John S. Robinson, for plaintiffs in error.

H. C. Brome, for defendant in error.

COBB, J.

This case arises upon a petition to the district court of Madison county for a peremptory writ of mandamus against the defendants, who then constituted the board of county commissioners of said county, commanding them to cause a certain section line road in said county to be opened and worked in the same manner as other public roads.

As the case was decided on demurrer to the petition, I here copy it at length :

"Your petitioner complains of the defendants for that the county of Madison now is, and for more than ten years last past has been, a political subdivision of the state of Nebraska, duly organized as a county under the laws thereof.

"The defendants, J. E. Throckmorton, Charles Olson, and Charles B. Burrows, now are, and ever since the 6th day of January, 1886, have been, the duly elected, qualified, and acting board of county commissioners of said Madison county; the said J. E. Throckmorton being chairman, and the said Charles Olson and Charles B. Burrows being members of said board of county commissioners.

"Your petitioner is, and for more than five years last past has been, a resident, elector, and taxpayer of said Madison county, Nebraska, and does now, and at all the time hereinafter mentioned has, resided within five miles of the proposed public road hereinafter referred to :

"The section line commencing at the north-east corner of section thirty-six, township twenty-four, range one west of the sixth principal meridian, in Madison county, Ne-

braska, running thence west on the section line between section twenty-five and section thirty-six, to a point on said section line where said section line is intersected by the existing public road in said Madison county, has not hitherto been opened and worked as a public road.

"The public good does now require, and at all the times hereinafter mentioned has required that said section line should be opened and worked in the same manner as other public roads.

"On the — day of January, 1886, there was filed with the county clerk of said Madison county, a petition in writing reciting the aforesaid fact that the public good required that said section line should be opened and worked in the same manner as other public roads, and praying the said board to open said road and cause the same to be worked as other public roads. Said petition being signed by ten electors of said Madison county, all of whom resided within five miles of said proposed road.

That said petition having been brought to the attention of said board of county commissioners, and the same being on file before said board, action thereon was deferred from time to time until the — day of April, 1886, at a regular session of said board held in the manner provided by law at Madison, the county seat of Madison county, for the consideration of general business of said board. Whereupon in the matter of said petition, and upon a hearing had thereon by said board of county commissioners, it was ordered that the several signers upon said petition be required to pay to the treasurer of said Madison county, on or before the first day of June, 1886, the sum of one hundred and twenty-five dollars, being the damages claimed to be sustained by reason of opening of said road by third persons, property owners, who had filed their claims for damages, which were allowed by the defendants as such board of county commissioners, then and in that event the said petition should be granted, and the

said section line should be opened and worked in the same manner as other public roads; but if said sum of money was not paid to the said treasurer on or before said date, then said petition should be denied, and said section line should not be opened and worked as a public road. The aforesaid order and decision of said board of county commissioners in the matter of opening said section line being entered upon the journal of said board of county commissioners, on said — day of April, 1886, in the words and figures following, to-wit:

“On motion of petitioners for road commencing on north-east corner of sec. 36, t. 24, r. 1, sixth principal meridian, Madison county, Nebraska, running thence west to the intersection of the present public road, pay all claims for damages for such road by the 1st of June, 1886, the petition will be granted; if not, rejected.

“That by law it was and is the duty of said board of county commissioners to cause said section line to be opened and worked in the same manner as other public roads. Yet the said board of county commissioners disregarded their duty in the premises, and in violation of the rights of your petitioner and others, electors and taxpayers of said county, interested in the opening of said section line, did on the — day of April, 1886, refuse, and do now refuse to open said section line, and cause the same to be worked as a public road; and did then and do now refuse to make any other or different order in the premises than the said order so as aforesaid made and entered upon the journal of said board of county commissioners on the said — day of April, 1886.

“That your petitioner is entirely without remedy in the premises, except relief be afforded by the interposition of this honorable court.

“Wherefore your petitioner prays that a writ of mandamus may issue, commanding said defendants, the board of county commissioners of said Madison county, at their

next meeting held after the service of said writ, by an order entered of record upon the journal of said board of county commissioners, to cause said section line to be opened and worked in the same manner as other public roads."

The defendants demurred to the petition. The following is a copy of the demurrer:

"And now come the said defendants and demur to the petition of the plaintiff, and assign the following grounds thereof:

"1. Because plaintiff has not legal capacity to sue.

"2. Because there is a defect of parties plaintiff.

"3. Because the petition does not state facts sufficient to constitute a cause of action.

"4. Because the plaintiff has not sufficient interest in the subject matter of this case to maintain this action.

"5. Because the statute gives the defendants power to establish the highway in question conditionally, and having done so the court cannot control such discretion by the writ of mandamus.

"6. Because the power to establish, open and lay out a highway is a judicial power, and cannot be controlled by the writ of mandamus.

"7. Because the petition shows the defendants have exhausted the powers invested in them by the statute.

The district court overruled the demurrer, and the defendants electing to stand upon the same, the writ was awarded and issued as prayed. Whereupon the cause is brought to this court on error by the defendants, who assign the following errors:

"1. The district court erred in entering judgment overruling the demurrer of the plaintiffs in error to the said petition of the defendant in error in this case, and in overruling each and every assignment of said demurrer, to which the plaintiffs in error at the time duly excepted.

"2. The district court erred in entering judgment in

this case, granting and awarding a writ of mandamus against the plaintiffs in error, to which plaintiffs in error at the time duly excepted."

The two errors assigned will be considered together.

The first point insisted upon by plaintiffs in error in their brief is, that the plaintiff or relator does not show such an interest in the subject matter in controversy as to enable him to maintain this action.

In the matter of opening a highway I do not think that a citizen of the county simply as such, has such an interest as is necessary to maintain an action by mandamus. He must have an interest in the road distinguishable from that of the whole body of the citizens of the county. But that interest may, and in almost all cases must, be held in common with many others. The statute recognizes such interest in all persons residing within five miles of the line of the proposed road. The provision is as follows:

"Sec. 4. Any person desiring the establishment, vacation, or alteration of a public road shall file in the clerk's office of the proper county a petition signed by at least ten electors residing within five miles of the road proposed to be established or vacated, in substance as follows," etc, Comp. Stats., Ch. 78.

I think the relator brings himself within the rule requiring him to show in himself a specific legal right aside from the rights of citizens at large of the county. To do this it was only necessary to declare that he is a citizen of the county residing within five miles of the line of the proposed road. This he has done.

The next point is that the issuance of the writ of mandamus is an attempt on the part of the district court to control the judicial discretion of the board of county commissioners. The rule is correctly stated in Judge MAXWELL's work on Pleading and Practice, cited by counsel for respondents, in the following language: "Where an inferior tribunal has a discretion, the writ will not be granted

to control the discretion of such tribunal; but if it refuse to act, mandamus will lie to compel it to exercise its discretion."

The provision of law specially applicable to section line roads is as follows:

"Sec. 46. The section lines are hereby declared to be public roads in each county in this state, and the county board of such county may, whenever the public good requires it, open such roads without any preliminary survey, and cause the same to be worked in the same manner as other public roads; *Provided*, That any damages claimed by reason of the opening of any such road shall be appraised and allowed as nearly as practicable, in manner hereinbefore provided. *And provided further*, That the county board, before opening such section line road, shall direct the county surveyor to perpetuate the existing government corners along such line, by planting monuments of some durable material with suitable witnesses wherever practicable, and make a record of the same." Comp. Stat., Ch. 78.

I think that the above section makes it a matter of judicial discretion to cause any section line to be opened and worked as a public road whether the same is petitioned for or not. Counsel for the relator, in his brief, in effect contends that upon the facts as set out in the petition, for none other are before the court, the county board had exercised its discretion and decided upon the existing facts that the public good required the opening of such road, and he contends that it thereupon became their duty to order it opened, without conditions. I cannot so read the allegations of the petition. But taking the facts altogether they amount to a refusal by the board upon the facts then existing to order the opening. Had the money been paid in, as required, a question might have been made by the land owners whether such conditional order was sufficient authority for opening the road. I pass no opinion upon that ques-

tion; but before the board will be compelled by mandamus to order and cause the said road to be opened, they must in the exercise of their judicial discretion have found upon the existing facts and conditions "that the public good requires it."

I conclude therefore that the writ was erroneously issued.

The judgment of the district court in overruling the demurrer and awarding the writ of mandamus is reversed, the demurrer sustained, and the cause dismissed.

JUDGMENT ACCORDINGLY.

MAXWELL, CH. J., concurs.

REESE, J., being related to one of the parties, did not sit, and took no part in the decision.

ORRIN L. BARTON, PLAINTIFF IN ERROR, v. J. N. H. PATRICK, DEFENDANT IN ERROR.

Statute of Frauds: CONTRACT NOT IN WRITING. B. and P. having been in negotiation for the purchase by B. of 2,000 acres of land off the east end of a large tract owned by P., B. wrote to P. as follows: "On the enclosed map you will observe that taking to the dotted lines are about 2,018 acres. Will you include this full amount in the sale? I think it would be better. If you cut off just 2,000 acres a good portion must be described by metes and bounds, which would be inconvenient, at least." P. replied: "The land marked out by you contains 2,088.97 acres instead of 2,018 acres as figured by you. This is more than I want to sell. Take out one of the plats marked in similar ink to this, and then B. will have to pay \$5.00 per acre for all extra land. Taking out the tract marked (1) will leave 2,002.77 acres, the price for which will be \$10,013.85. Doing the same with tract (2) will leave 2,007.69 acres, for which the price will be \$10,033.45." In an action by B. against P. for refusing to con-

vey the 2,018 acres according to the dotted lines on the map, for \$10,090.00, *Held*, That if there was a contract between the parties for the sale of that specific property, the same was void under the statute of frauds for the want of a contract or some note or memorandum thereof in writing.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

John L. Webster and *George W. Doane*, for plaintiff in error.

John M. Thurston and *Robert W. Patrick*, for defendant in error.

COBB, J.

The cause of action is set out in the plaintiff's petition as follows: "That on the 20th day of August, 1888, the defendant, being owner of the lands hereinbefore described, did on said day, by Robert W. Patrick, his attorney in fact, enter into an agreement with the plaintiff partially oral and partially in writing, to-wit, in letters and telegrams, whereby the defendant agreed to sell to the plaintiff (here follows the description of a large number of tracts of land) in Nance county, Nebraska, for the sum of \$10,090, which said sum was to be deposited by the plaintiff in the Platte Valley Bank and to be delivered by said bank to the said defendant upon delivery by said defendant to the plaintiff of a warranty deed to said lands; that the plaintiff did deposit in said bank, for the use of the defendant, said sum of money in payment for said lands, and complied with all things on the plaintiff's part to be performed, and demanded the delivery of the deed; and that at said time said lands were worth the sum of \$25,000.

"Therefore plaintiff prays judgment for \$25,000, his damages.

"The defendant filed an answer, and therein denies that

on the 20th day of August, 1883, or at any other time, he entered into any agreement to sell and convey to the said plaintiff the said lands, and denies that the plaintiff deposited in the Platte Valley Bank the \$10,090, and denies that the plaintiff has complied with the terms of the contract, and denies that the plaintiff demanded the delivery of the deed, but avers that he offered to convey the lands for the sum of \$10,090, which offer the plaintiff refused to accept; denies that said lands were worth the sum of \$25,000, and avers that said contract was never reduced to writing and signed by the defendant or his agent, nor was any note or memorandum thereof in writing ever made and signed by the defendant, nor did the plaintiff pay any part of the purchase price, and that the same is void by reason of the statute of frauds, and denies each and every of the allegations in said petition contained.

"And thereupon the plaintiff filed a reply, denying that the plaintiff failed to deposit the money in the Platte Valley Bank, and averring that the money was so deposited, and denies that defendant offered to convey the lands, and denies that said contract was not reduced to writing and signed by the agent of defendant, and avers that said contract was reduced to writing by letters and telegrams, and so signed by Robert W. Patrick, defendant's attorney in fact, for the defendant, and that the purchase price was paid in manner and form as in the petition averred, and that said contract was not void by reason of the statute of frauds. That afterwards, on the 18th day of June, 1885, a trial was had to a jury, and on the 22d day of June, 1885, the plaintiff having closed his testimony, the defendant moved for a non-suit, which motion was sustained and the jury discharged and judgment rendered for the defendant, and to which the plaintiff excepted."

The cause was then brought to this court on error by the plaintiff, who assigns the following errors:

"*First.* That the said court erred in sustaining the motion of the defendant Patrick for a non-suit.

"*Second.* That said court erred in overruling the motion of the plaintiff Barton for a new trial."

Counsel for plaintiff in error, in the brief, admit that the letters and telegrams in evidence fail to express that part of the contract which provided the time, place, and manner of payment. But this they claim was supplied by a subsequent parol contract made between the plaintiff and defendant's agent at Central City, and they cite section 24 of chapter 32, Comp. Stats., together with numerous cases and text-books to the proposition that under the statute known as the statute of frauds, all that part of a contract falling within its provisions which relates to the manner and time of the payment of the consideration need not be in writing; that "this part of the contract, therefore, not being within the statute of frauds must be treated and considered like any other contract in writing not within the statute of frauds, and is therefore subject to be modified by a subsequent parol agreement if based upon any sufficient consideration. All there is in the oral agreement is the *mutual promise*, and the *time and place of performance* should be changed."

The cases cited are most of them where a contract in writing, perfect in all its parts, had been changed as to the time or manner of its performance by a subsequent parol agreement; but I find in none of them a discussion of the section of statute cited. I think these authorities fairly sustain the proposition that a written contract within or without the statute of frauds may be waived as to the time, place, or manner of performance by a subsequent parol contract. I am willing to concede, for it seems to be the language of the section cited, that the consideration of a contract required to be in writing may be proved by parol.

But the point of difficulty in the case, as appears to me, is that the contract, as proved either by the letters and telegrams offered in evidence, or by the parol evidence, or both

taken together, does not show or define the precise subject of the contract. I copy the letters and telegrams bearing on this point from the abstract:

"JULY 31, 1883.

"ROBT. W. PATRICK, Neb. Nat. Bank Building,

"Omaha, Neb. :

"Can sell for \$4 for first and \$5 for second thousand, line to run north and south, \$9,000 cash. Answer by telegraph at once as party leaves to-morrow.

"REINOEHL,

"SHERWOOD & REINOEHL."

"OMAHA, August 1, 1883.

"SHERWOOD & REINOEHL :

"Hold offer open until Tuesday.

"PATRICK & Co."

"CENTRAL CITY, NEB., August 1, 1883.

"R. W. PATRICK:

"DEAR SIR—Your telegram was received during Mr. Sherwood's absence. I immediately went to see our purchaser, and he informed me that he could not possibly defer final action in the matter to so late a date as indicated in yours. To close the bargain at once he will offer an additional \$500 to the amount already offered, making \$9,500 for the east 2,000 acres ; this, however, must be accepted to-morrow.

"If you can accept this proposition let me know by to-morrow's mail which reaches here at 4:32 and leaves your city about noon, or if you see fit, you can send me telegram.

"Of course you will understand that the tract for which this offer is made includes about all the broken and sandy land in the *entire* tract.

"Answer as requested, and if you accept the offer purchaser will close the transaction within fifteen days.

"Respectfully yours,

"A. L. REINOEHL."

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"OMAHA, August 2, 1883.

"A. L. REINOEHL:

"Cannot accept less than ten thousand.

"R. W. PATRICK."

"AUGUST 2, 1883.

"R. W. PATRICK:

DEAR SIR—Have sold the tract to O. L. Barton for \$10,000. Will write you further and give description of land to-morrow.

"I will take some time to make an accurate description as there are so many fractions. I am going to land office to-night to get official figures. The tract sold is two thousand acres off the east end.

"REINOEHL & SHERWOOD."

"AUGUST 3, 1883.

"REINOEHL & SHERWOOD, Central City, Neb.:

"GENTLEMEN—Yours of the 2d received and contents noted. As you are probably aware, full payment of the land in question has not been made. Let Barton deposit the money at the Nebraska National Bank subject to my order upon presentation of deed and certificates of full payment, in evidence of good faith, and I will at once go to Grand Island, make full payment, and deliver him a good warranty deed for the two thousand acres. Or, if he prefers, I will deposit the deed when he deposits the money and then make the payments.

"I shall be in Grand Island on or about Thursday of next week, if not earlier.

"Yours,

"ROBERT W. PATRICK."

"CENTRAL CITY, August 3, 1883.

"R. W. PATRICK:

DEAR SIR—On the enclosed map you will observe that taking to the dotted lines are about 2,018 acres. Will you

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include this full amount in the sale? I think it would be better.

"If you cut off just 2,000 acres a good portion must be described by metes and bounds, which would be inconvenient, to say the least. Let me hear from you by return mail about this, and please return the map. These the number of acres given on the affixed map at Grand Island land office.

"Yours,

"A. L. REINOEHL."

"AUGUST 4, 1883.

"MR. A. L. REINOEHL, Central City, Neb.:

"DEAR SIR—Yours of the 3d at hand. The land marked out by you contains 2,088.97 acres instead of 2,018 acres as figured by you.

"This is more than I want to sell. Take out one of the plats marked in similar ink to this and then Barton will have to pay \$5 per acre for all extra land. Taking out the tract marked (1) will leave 2,002.77 acres, the price for which will be \$10,018.85. Doing the same with tract marked (2) will leave 2,007.69 acres, for which the price will be \$10,033.45. Or, if neither plan will suit him, make any arrangement with him so as to give him as nearly as possible 2,000 acres off the east end, line of division to run north and south, price \$5 per acre.

"Of course an acre or two more or less will not matter, but 80 acres makes a difference.

"Yours, &c.,

"ROBERT W. PATRICK."

"It is agreed by counsel that the two tracts marked one and two (1 and 2) by pencil on the map are the pieces referred to in the letter, and that the figures of Reinoehl in the letter of August 3d, showing the same to contain 2,018 acres, were correct, and that Patrick was mistaken in his computation in 'Exhibit J.'

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"AUGUST 9, 1886.

"MR. A. L. REINOEHL, Central City, Neb. :

DEAR SIR—Having received no reply to mine of the third, I have not deemed it best to go to Grand Island. If Barton will comply with the terms proposed please telegraph me at once and I will come up.

"Yours,

"ROBERT W. PATRICK,"

"CENTRAL CITY, NEB., August 10, 1886.

"R. W. PATRICK, Omaha, Neb. :

"Barton is raising money ; can we have five days ? Sale is sure. Answer at once.

"REINOEHL & SHERWOOD."

"OMAHA, NEB., August 10, 1886.

"To A. REINOEHL, Central City, Neb. :

"You can have seven days. Will come next week Grand Island.

"R. W. PATRICK."

CENTRAL CITY, NEB., August 16, 1886.

"R. W. PATRICK, Omaha, Neb. :

"All ready. Come to-morrow. Answer.

"A. L. REINOEHL."

"COLUMBUS, NEB., August 17, 1886.

"To A. L. REINOEHL, Central City, Neb. :

"Can you meet me in Grand Island this evening or to-morrow morning ? Answer quick. Columbus.

"R. W. PATRICK."

"CENTRAL CITY., August 17, 1886.

"R. W. PATRICK, Columbus, Neb. :

"Can go to Grand Island on number three this P. M.

"A. L. REINOEHL."

"COLUMBUS, NEB., August 17, 1883.

"To A. L. REINOEHL, Central City, Neb.:

"Meet at number three. Barton must close sale to-day.

"R. W. PATRICK."

There is parol evidence that Sherwood and Reinoehl met Patrick on the train, the latter being on his way to Grand Island, the day of the date of the last above telegram, and told him they were ready to close the trade. Also that on the next day Patrick came to Central City and entered into an arrangement with Barton by which he was to deposit the money for said land in a bank there, so as to give him (Patrick) credit at a bank in Omaha for money with which to make certain payments to the government for said land. But there is no evidence of any further reference between the parties, either in writing or by parol, to the point as to the exact line which was to separate the land sold from that to be retained by the vendor.

The section of our statute, Comp. Stat., Ch. 32, usually called the Statute of Frauds, which the defendant invokes by his answer, reads as follows:

"Sec. 5. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void unless the contract or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made."

In Parsons on Contracts, Vol. 1, p. 8, cited by counsel for defendant, the essentials of a legal contract are stated to be: First, the parties; Second, the consideration; Thirdly, the assent of the parties; and, Fourthly, the subject matter of the contract, or what the parties to it propose as its effect.

My present purpose does not involve an examination of either the first or second of the above essentials to a legal contract, as stated by the author cited. The third and fourth I will consider in their inverse order.

"It must, of course, appear from the memorandum what is the subject matter of the defendant's engagement. Land, for instance, which is purported to be bargained for, must be so described that it may be identified." Brown on Stat. Frauds, § 385.

In the case of *Williams v. Morris*, 95 U. S., 444, Mr. Justice Clifford, in the opinion of the court, said, "Decided cases everywhere require that the memorandum should mention the price. Nothing is contained in either receipt to fulfil that requirement, nor do the receipts contain anything of an unambiguous character to enable the court to determine what real estate is the subject of the purchase. Part of the property lying west of the tenement, the evidence shows never was occupied by the respondent; and the second receipt in its terms limits the purchase to the tenement, which the respondent occupied and repaired. None of the terms, says Mr. Phillips, can be left to be supplied by parol," etc., citing *Baptist Church v. Bigelow*, 16 Wend., 28, and *Morton v. Dean*, 13 Metc. (Mass.), 385.

In the case of *Holmes v. Evans*, 48 Miss., 247, which was an action for the specific performance of a contract for the sale of real estate, it was held (I quote from the syllabus) that "a receipt duly signed for \$100 as part payment on a piece of property on the corner of Main and Pearl streets, city of Natchez, county of Adams, state of Mississippi, is defective as a contract under the statute of frauds, being void for uncertainty and a bill in equity to enforce specific performance of the agreement to which it was claimed to refer, was properly dismissed."

The authorities holding with the above are very numerous, and with but little conflict. Some of them, it is true, hold that certain ambiguities in the description of the subject may be supplied by parol; and all of them, I think, in which the point arises, that it may be supplied by reference to other writings, answering certain conditions. But in the case at bar the difficulty is not sought to be met in

either of these ways. The first reference to the matter of the description of the land, the subject of the sale between the parties, occurs in plaintiff's exhibit "F," in which Reinoehl and Sherwood, the agents, write to the agent of the defendant that "It will take some time to make an accurate description as there are so many fractions. That they were going to the land office to get official figures, and that the tract sold is two thousand acres off the east end." In the next letter, from one of the agents to Patrick, exhibit "H," he suggests that it would be better to sell the land according to a certain map with dotted lines, which would make the subject of the purchase 2,018 acres instead of 2,000 as originally contemplated. To this letter Patrick replied (exhibit "I"), stating that the land marked on the map amounted to 2,088.97 acres instead of 2,018, and declining to sell that much land. Then follows, "Take out one of the plats marked in similar ink to this, and then Barton will have to pay \$5 per acre for all extra land. Taking out the tract marked (1) will leave 2,002.77 acres the price for which will be \$10,013.85. Doing the same with the tract marked (2) will leave 2,007.69 acres, for which the price will be \$10,033.45. Or if neither plan will suit him, make any arrangement with him so as to give him as nearly as possible 2,000 acres off the east line of division to run north and south, price \$5 per acre."

This is all that is shown by the record as to the description of the land sold, except the following from the abstract:

"It is agreed by counsel that the two tracts marked one and two (1 & 2) by pencil on the map are the pieces referred to in the letter, and that the figures of Reinoehl in the letter of August 3, showing same to contain 2,018 acres, were correct, and that Patrick was mistaken in his computation in exhibit 'J'; also the following, from the testimony on the stand of Mr. Reinoehl: "The map, when returned to the witness, was shown to the plaintiff as exhibiting the land which he was to take."

The above evidence, to my mind, shows this state of facts: The agent of the plaintiff having been in negotiation with the agent of the defendant for the purchase of 2,000 acres of land off of the east end of a larger tract, submits a proposition to him to include an additional quantity of land in the sale, exhibiting to him a map, in which the new line is represented by dots. This proposition the defendant's agent, by reason of an error in his calculation of the contents of the additional tract, conceiving that it covered more land than he or his principal desired to sell, declined. The agent of the plaintiff, receiving the letter containing this declination, seems to have known that it was made through a mistake of fact, or an error of arithmetic, and so they treat it as an acceptance of the amended proposition. And, as I understand the case, the action is brought for damages for the refusal or failure of the defendant to convey the land as shown by the dotted lines on the map. It cannot be seriously insisted, it seems to me, that this record shows any promise, either in writing or by parol, for that matter, to convey *that land*. The greatest quantity of land which the defendant ever offered to sell, so far as appears, was 2,007.69 acres for the price of \$10,083.45. And the suit is brought for refusing to convey 2,018 acres for the price of \$10,090.

I therefore come to the conclusion that there was not shown any contract in writing, nor any note or memorandum in writing of the agreement set out in the petition, so as to take the case out of the operation of the statute of frauds. Nor, independent of the statutes, was there evidence of even a parol agreement to convey the precise property described in the petition.

As to the third point, as laid down by Parsons, as we have seen in his enumeration of the essentials of a legal contract, the assent of the parties, it is probably unnecessary to say anything in this opinion. Yet it seems to me very plain that the letter of Robert W. Patrick, of Au-

gust 4 (exhibit "J"), contained two distinct propositions, either one of which was susceptible of being assented to by the plaintiff, and that thereupon the proposition so assented to would have become a binding contract; the said letter, taken in connection with the letters and telegrams which went before, and the map therein referred to, constitute a note or memorandum thereof in writing answering all the requirements of the statute of frauds. These were the propositions to sell the lands as shown by the plat, taking out the tract marked (1), leaving 2,002.77 acres for \$10,013.85 or the same lands, taking out the tract marked (2), which would leave 2,007.69 for \$10,033.45. It does not appear that the plaintiff assented to either of these propositions, but claims to have assented to one which, as we have seen, was never made, to-wit, the sale of 2,018 acres of land at the price of \$10,090.

If I am correct in the above views, it then follows that the order and judgment of the district court in taking the case from the jury and rendering judgment for the defendant was correct, without reference to the matters urged by counsel for defendant in the second and third points of his brief. They will therefore not be examined. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

The other judges concur.

CHARLES SANG, PLAINTIFF IN ERROR, V. HENRY J. LEE,
DEFENDANT IN ERROR.

Judgment: DEFAULT. In an action by L. against S., on a money demand, S. failed to appear or answer; his default was entered. L. proved up, and judgment was rendered in his favor. Two days thereafter, and before the final adjournment of the term, the defendant appeared and filed a motion to set aside the default and judgment accompanied by his affidavit and an answer to the merits. Plaintiff also filed an affidavit in resistance. Considering the two affidavits together, it appears that there had been an attempt at negotiating a settlement; defendant claiming that negotiation was had after the suit began, while plaintiff's counsel claimed that such negotiation was had and failed before summons issued. The judgment of the district court, refusing to set aside the judgment and default, upheld.

ERROR to the district court for Dodge county. Tried below before POST, J.

William Marshall, for plaintiff in error.

W. H. Munger, for defendant in error.

COBB, J.

It appears from the abstract that on the 28th day of March, 1885, the plaintiff, defendant in error, commenced this action in the district court of Dodge county, and filed his petition in said court, praying judgment against the defendant, plaintiff in error, for a certain sum, the amount of which, or the particulars of his cause of action, it is not deemed necessary to state here. The said defendant having failed to appear or answer, the plaintiff by his attorney, on the 15th day of June next ensuing, the said court being then in regular session, called up the said action; and the said court having found that the said defendant had had due and legal service of the summons in the said

action, his default was regularly entered, whereupon the said cause came on for a trial, and the plaintiff having waived a jury, the said cause was tried to the court, which, after hearing the evidence offered by the plaintiff, made a finding and rendered a final judgment for him.

On the 17th day of said month of June, the said court being still in session, the said defendant filed answer therein in said cause, setting out his defense to the said petition and action of the plaintiff, and tendering an issue therein; and thereupon made and filed a motion to set aside the said default, as follows:

“MOTION.

“And now comes the defendant and moves the court here to set aside the default herein for the reasons following:

“1st. Because the said default has not yet been entered upon the journal and records of this court.

“2d. Because said defendant and the attorney of the plaintiff were in good faith making every effort to settle the matters in controversy in this cause without further litigation or costs, and that the defendant believed, and thought he had good reason to believe, that no default would be by the plaintiff taken against this defendant pending negotiations for said settlement, and said negotiations are still pending, as will more fully and at large appear from the affidavit of the defendant herewith filed and made part of this motion.

“3d. That this defendant, believing that no default would be taken against this defendant, and that the said matter in dispute would and could be settled without further suit, he delayed filing his answer.

“4th. That this defendant has a good and meritorious defense as to \$506.73 of the amount claimed by the plaintiff.

“5th. The defendant prays that the said default be set

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aside, and that the defendant be allowed to file his answer herein."

And filed and presented the following affidavit in support of his said motion :

"AFFIDAVIT OF CHARLES SANG, DEFENDANT.

"Charles Sang, being first duly sworn on his oath, deposes and says that he is the defendant in the above entitled action, that the account attached to the petition of the plaintiff is an account in part between the firm of Henry J. Lee & Co., said firm being composed of the plaintiff, Henry J. Lee, and Charles A. Fried, and includes so much of said account as covers the time up to the spring of 1880; that the firm of E. M. Maxwell & Co. were doing business in the city of Fremont, Nebraska, from about the 23d day of January, A.D., 1878, up to about the first of May, 1881; that the Union Barbed Wire Company were desirous of obtaining from the said E. M. Maxwell & Co. a place in the building of said E. M. Maxwell & Co., wherein to manufacture barbed wire, and to obtain work and machinery from said E. M. Maxwell & Co.; that E. M. Maxwell & Co. were not willing to let the said Union Barbed Wire Company have any power machinery or the repair thereof, or to rent any part of the building occupied by the said E. M. Maxwell & Co. to said Union Barbed Wire Co., and that the said Charles A. Fried, who was then the manager of the business of the said Union Barbed Wire Co., promised to and agreed with the said E. M. Maxwell & Co. that the firm of H. J. Lee & Co. would give to the firm of E. M. Maxwell & Co. credit for the rent of the building occupied and rented by the said Union Barbed Wire Co. from the said E. M. Maxwell & Co., and would give the said E. M. Maxwell & Co. credit for whatever might become due from the said Union Barbed Wire Co. for anything that said Union Barbed Wire Co. might get of said E. M. Maxwell & Co.;

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and the said E. M. Maxwell & Co., relying upon the promise of the said H. J. Lee & Co. to become responsible to the firm of E. M. Maxwell & Co. for the rent to become due from the said Union Barbed Wire Co. to the said E. M. Maxwell & Co., did rent a part of their building to the said Union Barbed Wire Co., and did let the said Union Barbed Wire Co. have the use of their power and did repair and make machinery for said Union Barbed Wire Co., in all amounting to the sum of \$506.73; that the said E. M. Maxwell & Co., during the time that said Union Barbed Wire Co. were so occupying the portion of the building of said E. M. Maxwell & Co., the said E. M. Maxwell & Co. were making large purchases of hardware and iron from the said H. J. Lee & Co., and upon this account the said credit was to be given by the said H. J. Lee & Co.; that being on friendly terms with the said H. J. Lee, and being anxious of settling the matter of the said credit due from the said H. J. Lee & Co., this affiant called upon Wm. H. Munger, the attorney of the said H. J. Lee, a short time after the service of the summons in this case upon him, and at the time of said call explained to the said Wm. H. Munger the manner in which he was entitled to the said credit, and informed the said W. H. Munger that one George Maxwell knew the above stated facts, and also informed the said Munger, either in that call or in a subsequent conversation, that one Minor H. Hinman knew the above facts, or something of the above facts; that the said Munger agreed to ascertain from the said George Maxwell and the said Hinman all he could about the facts in this case, and that if the facts turned out to be as this affiant represented, the said Munger said he thought there would be no trouble in having the matter settled without the expense of further litigation; that this affiant had several conversations with the said W. H. Munger in regard to said matter, in the effort to settle the same without further costs; and that from these conversations touch-

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ing the settlement of the matters in dispute between this affiant and the said H. J. Lee, this affiant was led to believe, and did believe, that no default would be taken against him in this action, and that he would be called only to answer in case these efforts at settlement failed, and was very much surprised to find that a default had been taken against him; this affiant further states that he knows and verily believes that as to said sum of \$506.73, a part proper of the account sued on in this action, this affiant has a good, meritorious, and valid defense; that as to the sum of \$245.55 he does not claim to have a defense, available to this affiant; and this affiant further says that had it not been for the said efforts made to have the matter in dispute settled without further litigation, he would have filed his answer herein at the proper time, and that he would have properly guarded his interests in said matter by filing his said answer; but as it was he neither employed an attorney or filed his answer, believing that these matters in controversy could and would be settled amicably without any further litigation or costs; and further, that he believed and thought he had good reason to believe that, pending negotiations for settlement, no advantage would be taken of him by way of default, and hence he did not file his answer herein, and that for the reasons above set forth he delayed filing his answer in said cause."

And thereupon, in resistance of the said motion, the plaintiff filed the affidavit of his attorney, as follows:

"W. H. Munger, being duly sworn, on his oath says that he is attorney for the plaintiff in this action, that he received from plaintiff the claim sued on in this action on or about the 1st day of April, 1884, that he at once notified defendant of the fact, and was informed by defendant that he was entitled to the credit of \$506.73 which he claims in his answer, and asked for the account that he might look over and see if such credit had been given. Affiant then and there gave to the defendant an itemized

account as attached to plaintiff's petition, commencing with the item—

‘1879. To amount account rendered, \$515.16,’ and all subsequent items, which affiant gave to defendant for examination; and afterwards, at the request of said defendant, affiant obtained and gave to defendant for inspection the full itemized account which is attached to plaintiff's petition; and afterwards, at the request of affiant, defendant gave affiant for inspection an itemized account of his said claim of \$506.73. Affiant did inform defendant that he would urge upon plaintiff to settle with defendant said cause, and inform defendant; that if said Hinman and Maxwell understood the facts as he, defendant, stated them, he, affiant, thought the matter could be settled; but affiant says upon informing plaintiff of the claim of defendant, plaintiff denied the said claim, and the said Fried also denied the same, or that he had nor agreed that the firm of H. J. Lee & Co. would pay or credit the said E. M. Maxwell & Co. for their claim against the Union Barbed Wire Co. or any part thereof, of all which affiant informed defendant before the bringing of this action; and affiant says that he, affiant, did see the said Hinman about said matters, and was informed by said Hinman in substance that he could not recollect anything about the matter and knew nothing about the transaction; and affiant further says that after seeing the said Hinman, affiant, on or about the 25th day of March last, and before the bringing of this action, wrote to defendant in substance of what Hinman said, and that he, affiant, had positive instructions to commence suit unless the matter was settled up, and that the suit must be commenced by the following Saturday, March 28, 1885, to get it into the next term of this court, and that if defendant wished to settle the matter without suit it must be done by that time; to which letter defendant answered under date of March 27th, 1885, as follows: “I am surprised at what you state about Hinman's remembrance of barb wire busi-

ness, and feel that he will talk different when he begins to refresh his memory. I will not be able to get down until evening, as Saturday is our busy day during the week. And affiant says, that not seeing the defendant, he, affiant, commenced the suit by filing the petition and having summons issued Saturday evening, the 28th of March, 1885; that some time afterwards, and before the term of court, defendant called into affiant's office and asked if we had heard from Maxwell, and was informed that affiant had not, and defendant then at that time asked for and took his itemized account for his said claim of \$506.73, which was then in affiant's possession, and which conversation was the last affiant had with defendant about the matter until after the default and proof of claim was made. And affiant says that all of the conversations referred to by defendant as having had with affiant were before the bringing of this action, except the one conversation at the time defendant called for and obtained his itemized account; and affiant says he told defendant before bringing suit that he, affiant, had done all he could do to have the matter adjusted, but that plaintiff and C. A. Fried each denied said claim of defendant was chargeable to said plaintiff or said firm of H. J. Lee & Co., and that on the 15th day of June, 1885, affiant took the default and proved up said claim, and judgment was rendered in favor of plaintiff on said 15th day of June, 1885, but not entered on the journal."

And thereupon the said motion was submitted to the court upon the said two affidavits, there being no other evidence submitted by either party. The motion was overruled, to which the defendant excepted, and brings the cause to this court on error, and assigns for error the overruling by the court of his motion to set aside the default of the defendant and in not vacating the judgment.

The bill of exceptions contains the following paragraph:

"On the 17th day of June, 1885, the defendant filed his motion to set aside the said default and judgment, accom-

panied with his answer and his affidavit setting forth the grounds of his not filing his answer at an earlier date, and it was thereupon, on said 17th day of June, 1885, agreed between the plaintiff and defendant that the journal entry of said judgment should not be made until after said motion was disposed of by the court," etc.

Plaintiff in error takes the ground in his brief that it is the rule of practice in this state, that if the defendant at any time after default, and before judgment is entered against him, file his answer duly verified, setting up a good and meritorious defense, then the court must set aside the default and allow the defendant to answer, and he cites the case of *Hale v. Bender*, 13 Neb., 66. I do not understand that any rule exists going to the extent contended for; certainly the case cited fails as authority therefor. It is certainly within the power of the court at any time during the term at which a judgment by default has been rendered to set the same aside, and allow an answer setting up a meritorious defense to be filed. But the exercise of such power is a matter of discretion on the part of the court, to be governed by the facts of the case as set out in the showing. This discretion is a legal one, the abuse of which would be corrected by the appellate court. In the case at bar there were two affidavits, one in support of the motion, the other in resistance. These affidavits are conflicting. The chief point of departure between them is in this: The defendant states in his affidavit "that being on friendly terms with the said H. J. Lee, and being anxious of settling the matter of said credit due from the said H. J. Lee & Co., this affiant called upon Wm. H. Munger, the attorney of said H. J. Lee, a short time after the service of the summons in this case upon him (def't.), and at the time of said call explained to the said Munger the manner in which he was entitled to the said credit," etc. See affidavit. Now if this affidavit stood entirely alone, it would make a case showing that the default of defendant was en-

tered pending an attempt on his part to settle the matter of difference between him and the plaintiff, and avoid litigation. But it does not stand alone. The affidavit of W. H. Munger was before the court, in which it is alleged that the call of the defendant upon him, and all the attempts to come to a settlement on the part of the defendant, as set out in his affidavit, took place before the commencement of the suit, and before his notice to the defendant as therein specified; that he had positive instructions to commence suit against him unless the matter was settled, and that suit would be commenced unless the matter was settled by the following Saturday, to-wit, March 28th, 1885. Even had no such letter been written, the commencement of suit by the plaintiff on the day named must have been understood by the defendant as the termination of any negotiation in view of a compromise or settlement which may have existed between the parties before that time, and to consider his former conversation with the said attorney as excusing the negligence of the defendant in allowing the answer day to pass without availing himself of his defense would not only have been an injustice to the plaintiff, but would be to hold out an inducement for delay in others. At all events it cannot be said that the judgment holding the defendant to the consequences of such negligence under the circumstances was such an abuse of discretion as calls for the correction of this court. On the contrary, I think the decision of the district court right.

Defendant, in the brief of counsel, takes the ground that no judgment had been rendered against him at the time of the filing of his motion to set aside his default, for the reason that such judgment had not then been journalized or spread at length in writing on the docket of the court, although the plaintiff had proved up his cause of action and the judgment of the court thereon had been announced from the bench. I think that the judgment was rendered (and entered, too, if there is any difference between the two

words), on the 15th day of June, although the minutes thereof had not been spread upon the docket at the time of the making of defendant's motion. To this point I cite the opinion of this court by Judge REESE, in the case of *Horn v. Miller*, ante p. 98. And still, although the judgment had been rendered, nevertheless the court, not having finally adjourned the term, had full power to set aside the default and judgment, and doubtless would have done so had it been satisfied from the case before it that defendant did in fact rely and had a right to rely on any promise made or inducement held out to him by plaintiff or his attorney that the matters in dispute would be settled without trial.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

REESE, J., concurs.

MAXWELL, CH. J., did not sit.

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| 5. Contradictory statements of witness; if no objection made, jury may consider same, and if sufficient, base their verdict thereon. <i>Cool v. Roche, Hall & Ray</i> | 550 |
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7. Must be applicable to the evidence. *Marion v. State*..... 233
8. If evidence is given from which a material fact may be inferred court may submit question of such inference to jury by proper instructions. *Marion v. State*..... 233
9. Correct instructions given, not erroneous because an improper reason for it is given. *Marion v. State*..... 233
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- policy was a waiver of that clause providing for arbitration and suit on policy might be maintained without such arbitration. *Western Ins. Co. v. Putnam*..... 331
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5. Upon application to revive dormant judgment where judgment debtor alleges payment and satisfaction, burden of proof is on plaintiff to show that judgment is unsatisfied. *Garrison v. Aultman & Co.*..... 311
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1. Return of officer may be amended to conform to the facts, even after the lapse of eight or nine years. *O'Brien v. Gaslin* 347
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1. Courts have jurisdiction over crimes committed on Indian reservations within the state. *Marion v. State* 233
2. Courts of this state have no authority to prosecute and punish one Indian for a crime committed against another on the reservation to which they each belong, so long as they maintain their tribal relations. *Ex parte Cross* 417
3. County judges and justices of peace have jurisdiction in action for money had and received, brought to recover back a deposit or money paid upon an agreement for the purchase and sale of land, where defendant omits or refuses to perform his agreement to convey the same. *Mushrush v. Devereaux* 49
4. When court has obtained jurisdiction of the cause for one purpose, it should retain it generally for relief. *Swift v. Dewey* 107
Buchanan v. Griggs 165
5. Where a court of general jurisdiction has rendered judgment under which real estate has been sold, the sale confirmed, and deed made to purchaser, the court will not, upon slight evidence after a great lapse of time, hold that it was without jurisdiction. *O'Brien v. Gaslin* 347
6. Power of determining the validity of a tax actually levied is a proper subject for the courts; the question is one of law and not of fact. *Price v. Lancaster County* 252
7. Failure to appoint guardian *ad litem* for insane person does not render judgment either void or voidable. *McCormick v. Paddock* 486
8. Judgment cannot be impeached collaterally. *McCormick v. Paddock* 486
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1. If proposed juror is "a relation within the fifth degree" to defendant, it is cause for challenge. *Marion v. State*.... 233
2. Under sec. 665 of Civil Code jurors are exempt from service in district court who have served in such court within two years. *Marion v. State*..... 233
3. Where after a jury has just been sworn and before any other step is taken in the case, the defense by permission of court challenges one of the jury, and the challenge is allowed and another juror called, the objection to further proceeding with the case to the jury as selected, *Held*, Properly overruled. *Marion v. State*..... 233
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1. A tenant who sows or plants a crop where it is not possible for him to know that his estate will terminate before the crop will ripen, and it does terminate before, is entitled to harvest and secure crop at maturity. *Sornborger v. Berggren*..... 399
2. On facts stated, *Held*, That the rights of vendee did not terminate; that where vendee had been in default for a number of years and had by his tenant sowed a crop before a forfeiture of his estate in the land, such forfeiture before the crops were ripe did not deprive him of his interest therein. *Sornborger v. Berggren*..... 399

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2. Where there is no continuing trust and money received by agent is not to be paid at a date later than its receipt, statute runs in his favor from the time he received the money. *Arnett v. Zinn*..... 591
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3. In reviewing assessment of an individual, board has judicial power. *Id.* 595
4. Mandamus lies to compel board to correct its record. *Id.* 595
5. Quit claim deed from purchaser at tax sale will vest in the grantee all rights of the grantor, and the taxes paid at such sale, and taxes subsequently assessed, and right to reclaim the same upon failure of tax title. *Alexander v. Goodwin* 216
6. Where treasurer sells land for taxes which are not taxable, and upon which no tax is due, the county is to hold purchaser harmless by paying the amount of principal, interest, and costs. *Roberts v. Adams County* 409
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8. Jury are sole judges of credibility of witnesses and weight of evidence. *City of Lincoln v. Holmes* 39
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HARVARD